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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1946**

# No. 1091

C. W. FALWELL, JR., AND FALWELL FAST FREIGHT, INC.,

*Appellants,*

*vs.*

THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

## JURISDICTION OF THE SUPREME COURT

This is a suit filed on July 7, 1946, in the United States District Court for the Western District of Virginia at Lynchburg, Virginia, for judgment or decree enjoining, setting aside, and annulling a report and order of the Interstate Commerce Commission, dated January 14, 1946, entered in a proceeding before the Interstate Commerce Commission known as Docket MC-F-2600, an application of plaintiffs to purchase the operating rights of W. B. Draper, doing business as Draper Motor Service, authorizing the transportation of general commodities over ir-

regular routes between Roanoke and Lynchburg, Virginia. The jurisdiction of the District Court rests upon the provisions of the Acts of Congress approved April 18, 1910, 36 Stat. (539), March 3, 1911, 36 Stat. (1148), and October 21, 1913, 38 Stat. (219), Title 28 United States Code, Sections 41 and 43 to 48, inclusive.

The ruling of the District Court is such as to bring the ruling within the provisions of Section 47a, Title 28 U. S. C. A.

The jurisdiction of the Supreme Court of the United States over this suit on appeal is allowed by 28 U. S. C. A. 47a, which section, in part, follows:

> "A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by the aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases."

This suit comes within the provisions of 28 U. S. C. A. 44, as Section 44 provides, in part, as follows:

> "The procedure in the district court * * * and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a, and 48 of this title."

Also, the jurisdiction of the Supreme Court over this suit on appeal is allowed by 28 U. S. C. A. 345, which section, in part, provides:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following acts or parts of acts (sections or parts of sections), and not otherwise: * * * (§ 47 and 47a of this title),

as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

The jurisdiction of this Court to reverse the orders of the District Court dated December 21, 1946 and January 13, 1947 and to stay the enforcement of the order of the Interstate Commerce Commission is allowed by 28 U. S. C. A. 47a, which section, in part, follows:

"The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or a justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court."

Judgment or decree from which this appeal is taken was rendered December 21, 1946 and the petition for leave to take appeal, with assignment of errors, was filed January 29, 1947, as amended on February 6, 1947.

The District Court erred in refusing to grant plaintiffs' prayer for an order annulling and setting aside and forever enjoining the enforcement of the report and order of the Interstate Commerce Commission, dated January 14, 1946, on the ground that said order, as plaintiffs allege, is unlawful and contrary to the provisions of the Interstate Commerce Act. The said report and order of January 14, 1946 are unlawful and contrary to the provisions of the Inter-

state Commerce Act, as by them the Commission undertakes to take away from plaintiffs' operating rights granted to them on February 22, 1945, which operating rights plaintiffs have operated, in own name, since February 22, 1945 to February 3, 1947, when, by virtue of the failure to obtain the requested judgment, plaintiffs had to discontinue conducting operations under those rights, as the order sought to have enjoined and set aside became effective on February 3, 1947.

The report and order of January 14, 1946 rendered by the Commission are unlawful and contrary to statutory provisions because the report and order of February 22, 1945 granted plaintiffs, upon consummation of the transactions, operating rights between Roanoke and Lynchburg, which authority plaintiffs exercised on February 22, 1945 and began, pursuant to a lawful order of the Commission, conducting operations between Roanoke and Lynchburg, in their own name, on February 22, 1945, and as no common carrier can lawfully engage in operation without a certificate, consummation of the transactions as authorized and actually conducting operations under those rights made the report and order of February 22, 1945 a certificate, hence not a decision, or, or requirement of the Commission, consequently not subject to an application for rehearing, reargument or reconsideration.

The report and order of January 14, 1946 are unlawful and contrary to statutory provisions and the specific provisions of a certificate as the Commission undertakes to alter or trim down a certificate of a carrier by imposing limitations and restrictions upon the kind of service that the said carrier can render differing from the kind of service that the certificate authorizes the carrier to render.

The report and order of the Commission, dated January 14, 1946, are unlawful and contrary to statutory provisions

in that the said report and order are based upon an issue not included within the provisions of Section 5 of the Act (49 U. S. C. A. 5).

The decision in this proceeding should be reviewed by the Supreme Court of the United States, as the subject matter of this suit is of vital importance to the motor carrier industry and the decision will, we believe, have a direct influence upon the future life and development of the motor carrier industry, because the order of the Commission sought to be enjoined establishes, in effect, the right of the Commission to revoke, on review, authority heretofore lawfully granted to a motor carrier and acted upon by such motor carrier, which has the effect of a certificate of public convenience and is in effect the granting of a franchise, which has been accepted by the motor carrier; and (b) the order complained of further seeks arbitrarily and wrongfully to impose restrictions and limitations upon the kind of service which may be rendered differing from the kind of service specified in a certificate which had been lawfully granted years before, contrary to the spirit and expressed provisions of the Interstate Commerce Act. (See *United States* v. *Seatrain Lines, Inc.*, decided by the Supreme Court January 6, 1947, U. S. Sup. Ct. 91 Law. Ed. 311.)

W. G. Burnette,
John D. Easley,
*Counsel for Appellants.*

## APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, AT LYNCHBURG.

C. W. Falwell, Jr., and Falwell Fast Freight, Inc., *Plaintiffs,*

*vs.*

The United States of America, et al.

Action by C. W. Falwell, Jr., and Falwell Fast Freight Inc., against the United States of America and the Interstate Commerce Commission to set aside and annul an order of the Commission denying to plaintiffs the right to acquire by purchase certain operating rights held by W. B. Draper, doing business as Draper Motor Service.

W. G. Burnette and John D. Easley, both of Lynchburg, Va., for plaintiffs.

Wendell Berge, Assistant Attorney General, Edward Dumbauld, Special Assistant to the Attorney General, for the United States.

Daniel W. Knowlton, Chief Counsel, and Nelson Thomas, Attorney, for the Interstate Commerce Commission.

J. Ninian Beall, of Washington, D. C., for Brooks Transportation Co., and Lucian H. Cocke, Jr., of Roanoke, Va., for N. & W. Ry. Co., Intervenors.

Before Dobie, Circuit Judge, and Paul and Barksdale, District Judges

Paul, District Judge:

The plaintiffs in this suit are Falwell Fast Freight, Inc., a Virginia corporation engaged in business as a common carrier of property in interstate commerce by motor vehicle, with its headquarters at Lynchburg, Va., and C. W. Falwell, Jr., owner of a controlling interest in the corporation. The controversy arises out of the desire and attempt of the plaintiffs to purchase certain operating rights of

two other carriers engaged in similar businesses, these being Evans Line, Inc., of Roanoke, Va. (hereinafter referred to as Evans) and W. B. Draper, doing business as Draper Motor Service, also of Roanoke. The object of the present suit is to set aside and enjoin the enforcement of an order entered by the Interstate Commerce Commission under date of January 14, 1946, in so far as that order denied to plaintiffs authority to acquire certain of the operating rights of Draper.

The background of facts upon which resort is had to this court is as follows:

Prior to July 31, 1944, Evans was the owner of operating rights over regular routes extending from Roanoke west to Bluefield, West Virginia, and thence north to Charleston and Point Pleasant in that state, including various intermediate points.

Draper was owner of a certificate authorizing operations over irregular routes between Roanoke on the one hand and, on the other, Lynchburg, Norfolk, Richmond and other points in Virginia as well as to various points in other states, north and south.

Falwell, the plaintiff here, held a certificate authorizing operations over a regular route between Lynchburg and New York, via Washington, Baltimore and Philadelphia and serving intermediate points; and over irregular routes to specified points and areas in Virginia and various other states. As usual, the certificates held by all of these parties contained limitations or exceptions as to the nature of the commodities to be hauled.

In this situation an agreement was entered into on July 19, 1944 between Falwell and Evans (which was in financial difficulties) whereby Falwell agreed to purchase all of the operating rights of Evans. Falwell also made an agreement with Draper, the date of which does not appear, to purchase from Draper that portion of the latter's rights which authorized operations over irregular routes between Roanoke and Lynchburg. Having made these agreements, the carrying out of which was subject to the approval of the Interstate Commerce Commission, Falwell, Draper and Evans, on July 31, 1944, filed their joint application before

the Commission seeking authority under Sect. 5 of the Interstate Commerce Act (49 U.S.C.A. 5) to consummate the transfer to Falwell of the rights described.

Shortly after this application was filed the Commission, on August 26, 1944, under authority of Sect. 210a (b) of the Interstate Commerce Act (49 U.S.C.A. 310a (b)) granted approval for temporary leases by Falwell of the rights sought to be acquired, these leases to expire February 21, 1945. Thereafter, and after notice given, a hearing upon the application for approval of the purchases was held before an examiner of the Commission at Roanoke, Va., on January 25, 1945. The notice for this hearing specifically stated that, since the application contained no request for issuance of operating authority greater than the sum of the existing operating rights of the parties, no request for issuance of any enlarged operating authority would be entertained at the hearing. At this hearing Brooks Transportation Company, a motor vehicle carrier operating within the territory covered by the rights involved in the application, appeared as a protestant. Certain railroad carriers also appeared in opposition to the application. At this hearing evidence, both oral and documentary, was received, including that offered by the plaintiffs. Thereafter, on February 22, 1945, Division 4 of the Commission entered a report and order in which it granted the application in full, with one of the commissioners dissenting.

Inasmuch as plaintiffs have laid stress upon certain terms of the order of February 22, 1945, it seems well to quote those provisions which they have so emphasized and upon which they, in large part, rest their present contentions. Omitting the heading, preliminary recitations and portions of the order not pertinent to this controversy, this order reads:

> "*It is ordered,* That purchase by Falwell Fast Freight, Incorporated, of Lynchburg, Va., of certain operating rights of W. B. Draper, doing business as Draper Motor Service, of Roanoke, Va., and of operating rights of Evans Line, Inc., also of Roanoke, and acquisition of control of said operating rights by C. W. Falwell, Jr., also of Lynchburg, through said purchase

be, and they are hereby, approved and authorized, subject to the terms and conditions set out in the findings in said report.

*It is further ordered,* That petition of Falwell Fast Freight, Incorporated, requesting extension of its present lease authority beyond February 21, 1945, be, and it is hereby, denied.

*It is further ordered,* That, if the parties to the transactions herein authorized desire to consummate same, they shall (1) notify this Commission, in writing, of the intended consummation date, (2) promptly take such steps as will insure compliance with sections 215 and 217 of the Interstate Commerce Act, and with rules, regulations, and requirements prescribed thereunder, and (3) confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.

*It is further ordered,* That unless the authority herein granted is exercised within 30 days from the date hereof, this order shall be of no further force and effect, with respect to the authority not exercised."

On the same day (Feb. 22, 1945) that the above order was issued, counsel for Falwell was notified by a telegram from the Commission's office of the favorable action of Division 4; and later on the same day received another telegram (apparently sent in response to one from him) repeating the information contained in the first, with the additional information that the Commission had been advised by the protestant that a petition for reconsideration would be filed.

On March 9, 1945, the protestant, Brooks Transportation Company, filed a petition for reconsideration of the report and order of Division 4 and after consideration of this petition the full Commission, by an order of May 7, 1945, ordered that the report and order entered by Division 4 on February 22, 1945, be reopened for reconsideration. In the meanwhile, by letter dated March 15, 1945, which was after the petition for reconsideration had been filed but before it had been acted on, Falwell informed the Commission that his purchase of the Draper and Evans rights had

been consummated on February 22, 1945. This was apparently in compliance with that provision of the order of February 22, 1945, which directed that the Commission be notified of the date when the sale was consummated. However, Falwell's letter recognized the existence of the petition for reconsideration filed by Brooks Transportation Company by stating that final payment to Evans had been deferred until a decision by the Commission on the petition for reconsideration.

Following its order of May 7, 1945, granting reconsideration the matter was considered by the full Commission until January 14, 1946. During this time, (on July 31, 1945) the plaintiffs asked leave to enlarge their application so as to pray for authorization for regular-route operations between Roanoke and Lynchburg but this motion was promptly denied. (August 11, 1946). As a result of the reconsideration by the full Commission it entered a report and order on January 14, 1946, in which it ordered that so much of the order of February 22, 1945, (the order of Division 4) as related to the purchase by Falwell of the Evans rights should remain in full force and effect, but that the application by Falwell to purchase the Draper rights was denied. In other words, the action of the full Commission was to approve the purchase by Falwell of the Evans rights but to disapprove the purchase of the Draper rights. Upon entry of this order of January 14, 1946, the Commission directed that the Draper rights, which plaintiffs had been operating under the temporary lease and under the order of Division 4, be returned to Draper as soon as possible. Later, upon application of the plaintiffs, the Commission refused a rehearing but did by several successive orders grant extensions of the time when the order of January 14, 1946, should become effective. While the last of these extensions was effective the plaintiffs instituted this suit.

The purpose of the suit is to set aside and annul the Commission's order of January 14, 1946, and the sole matter in controversy relates to the refusal of the Commission to permit Falwell to acquire that portion of the rights owned by Draper which authorize operations over irregular routes between Roanoke and Lynchburg.

## Discussion

In support of their prayer that the order complained of be set aside and its enforcement enjoined the plaintiffs urge three principal reasons. None of them, in our opinion, justify the court in granting the relief prayed for.

(1) In the first place it is contended that the report and order of Division 4, of February 22, 1945, constitute in fact and in substance a certificate of public convenience and necessity, which is not subject to review or reconsideration but which may be terminated only in accordance with Sect. 212a of the Act (49 U. S. C. A. 312a) providing procedure for the suspension or revocation of certificates, permits and licenses. The argument advanced in support of this view is somewhat involved but careful consideration of it does not permit us to accept its conclusion.

The petition filed by the plaintiffs before the Commission was not an application for a certificate of public convenience and necessity under Sects. 206 and 207 of the Act (49 U. S. C. A. 306 and 307). On the contrary it was an application for approval by the Commission of the proposed purchase by and transfer to one operator of rights then held by another. This is provided for by Sect. 5 (2) (a) of the Act (49 U. S. C. A. 5 (2) (a)) wherein such purchases are made lawful "with the approval and authorization of the Commission, as provided in subdivision b". Subdivision b provides that authority for such proposed transactions shall be sought by an application filed before the Commission and provides for the ensuing procedure thereon. The petition filed by the plaintiffs stated that they were proceeding under these provisions of the statute.

So far as appears from the record before us, the matter followed the usual and prescribed course. A hearing was had before an examiner at which evidence was taken and at which other interested parties appeared as protestants. Acting presumably upon the strength of the examiner's report and its own consideration of the facts, Division 4 approved the application of the plaintiffs as set out in its order of February 22, 1945. But this was not a final or irrevocable action. Sect. 17 of the Act (49 U. S. C. A. 17) which,

among other things, deals with Commission procedure and the division of the members of the Commission into Divisions provides (in Sect. 17 (6) that any decision, order or requirement made by the Commission, a division, an individual Commissioner or a board shall, on application therefor, be subject to rehearing or reconsideration under such rules as the Commission may determine. And Sect. 17 (7) provides that after such rehearing or reconsideration of the decision or order of a division or of an individual Commissioner, the Commission may reverse, change or modify the same.

The action of Division 4 was always, by the clear terms of the statute, subject to reconsideration by the full Commission, provided application was made therefor within the time prescribed by the rules of the Commission—which was done. The plaintiffs not only were affected with notice of the terms of the statute but, on the same day that Division 4 entered its order, they received actual notice that an application for reconsideration was contemplated. It is true that the order of Division 4 was definite in its terms of approval of the proposed transaction and in its directions to the plaintiffs. It had to be; for the reason that if no reconsideration of it were to be sought, it would have embodied the terms on which the plaintiffs were to proceed and with which they would have had to comply. But any action which the plaintiffs took toward carrying out the provisions of the order was, as they well knew, subject to what might happen if, as a result of reconsideration by the full Commission, the order was reversed or modified.

In view of the plain terms of the statute and the evident regularity of the procedure in compliance therewith, we see no justification for the contention that the order of February 22, 1945, was in effect a certificate of public convenience and necessity terminable only by a proceeding under Sect. 212a of the Act. The plaintiffs contend that they consummated the purchase of the Draper rights on February 22, 1945, and the implied argument is that having relied on the order of Division 4 and complied with it, it would be inequitable to permit disturbance of this completed transaction. It will be noted that this date is that on which the report and order of Division 4 was handed down. It

may be that the parties were able to complete their transaction within these few hours. Inasmuch as plaintiff had been for some time operating the Draper rights under lease it is possible that the transition from lease to ownership was merely nominal. On the other hand the notice to the Commission of this consummation of purchase was not until March 15th, about a week after the formal application for reconsideration had been filed by the protestant; and it may be that plaintiffs thought their position would be strengthened by showing a completed transaction ante-dating the application for reconsideration. Whichever be the case, it is clear that the plaintiffs could not oust the jurisdiction of the Commission to grant reconsideration merely by hastening to comply with the order of Division 4 before the protestant could file its application for reconsideration. To permit this would be to nullify the provisions of the statute. It is to be noted also that when this matter was before the full Commission on reconsideration the plaintiffs, so far as appears from the record before us, at no time objected to the validity of the reconsideration or contended that the order of Division 4 occupied the status of a certificate. This argument appears for the first time in this court.

2. The second and the third objections advanced against the Commission's order of January 14, 1946, seem to be closely related and may be discussed together.

The action of the full Commission in denying to plaintiffs the acquisition of the Draper rights was based on a finding which was in substance that during the period of their lease and thereafter the plaintiffs had been utilizing these rights for the conduct of regular-route operations between Lynchburg and Roanoke; that the plaintiffs intended to use the Draper rights in this manner and for this purpose and that they would not and could not be used in any other way; that if the Draper rights were unified with the already existing regular route operating rights of plaintiffs out of Lynchburg, it would be impossible for plaintiffs to operate irregular-route operations between Lynchburg and Roanoke of the nature contemplated in the original grant to Draper. It found that the purpose of the proposed purchase and its necessary result would be that the plaintiffs would conduct

regular-route operations between Lynchburg and Roanoke which at Lynchburg would link up with its existing regular routes out of that city to the north and east and at Roanoke would link up with the regular routes to be acquired from Evans; thereby giving to the plaintiffs continuous regular-route operations from points north and east of Lynchburg to points west and north of Roanoke and passing through both cities. And, after pointing out that the rights of Draper were radial irregular-route operating rights which had been confirmed to him under the "grandfather" clause, the Commission stated that, "This portion (i.e. that portion sought by plaintiffs) of the radial rights of Draper to and from Roanoke should continue to be a part of the whole, as confirmed under the "grandfather" clause, if there is to be any possibility of preserving the irregular-route nature of the service authorized." For these reasons, the more detailed recital of which appears in the Commission's report but need not be repeated here, the Commission found that the purchase by plaintiff of the described operating rights of Draper was not shown to be consistent with the public interest.

These findings of the Commission are first assailed on the ground that they are erroneous and unfounded and are arbitrary and capricious. So far as this assault relates to the Commission's determination on factual matters developed before it, a sufficient answer lies in the fact that the plaintiffs have not introduced before us any part of the transcript of the evidence taken in the matter and upon which the Commission reached its conclusions. In the absence of knowledge of what this evidence was we have no basis for saying that the findings of the Commission were arbitrary, capricious or without evidence to support them. This is too well settled to permit argument. See *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286, where it is stated:

> "The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made. * * *. These findings in the report thus being accepted as true, there is left only the inquiry whether they give support to the conclusion."

Nevertheless it may be said that even the present record gives confirmation of the Commission's finding that the proposed purchase would result in the plaintiffs establishing regular-route operations between Lynchburg and Roanoke and was for that purpose. There seems to be no dispute as to that. The plaintiffs have not denied that during the lease from Draper, and since, they have operated these rights in the manner found by the Commission; nor do they aver any intention to operate them otherwise. Indeed the nature of the actual and intended use of the Draper rights by plaintiffs is evidenced by the fact that they sought both before Division 4 and before the full Commission to amend their application so as to request issuance of a certificate to cover specifically the manner in which they had been operating, i.e. a certificate authorizing regular-route operations. And they go further in their tacit admissions of their intentions by arguing before us that the linking of their existing regular-route operations through purchase of the Draper rights would be in the public interest because it would enable them to conduct regular-route operations from New York through Lynchburg and Roanoke and beyond, without interchange.

It seems, however, that plaintiffs' real reason for asserting that the Commission has acted arbitrarily and in an erroneous conception of the law is embodied in their contention that even if plaintiffs intend to operate the Draper rights in the manner found by the Commission the Commission is without power to deny them the right to make this purchase. The nature of this contention is best shown by quotations from plaintiffs' brief, wherein it is stated:

> "A carrier over regular routes means 'one operating over specified routes between fixed termini as set forth in the carriers certificate' and a carrier over irregular routes means 'one operating within a specified and defined territory as set forth in the carriers certificate but not over a specified route or routes between fixed termini'. Neither the Act nor the regulations of the Commission * * * makes any distinction between an irregular-route carrier and a regular-route carrier except as to the routes over which the operation is con-

ducted. The terms 'regular' and 'irregular' have no reference whatever * * * to any particular schedule of service, quantity of service or quality of service to be rendered by a regular-route carrier and an irregular-route carrier. * * *. A regular-route carrier is limited in its operation to specified highways, but an irregular-route carrier has no limitations whatever as that carrier is privileged to use any and all highways between the points or within the territory specified in the carrier's certificate and an irregular-route carrier may use the same highway whenever it desires to do so, as neither the Act nor the regulations of the Commission * * * prevents the frequent or infrequent use of any given highway."

This argument, as we understand it, amounts in the end to this: That a certificate for irregular-route operations over a specified territory carries no restrictions as to the highways (or routes) over which the carrier may operate within the territory or between the points specified in his certificate; and that the carrier is likewise under no prescription or restriction as to schedules of service or quantity or quality of service. And that, therefore, the holder of a certificate for irregular-route operations may, if he choose, utilize his rights or any part thereof to establish regularly scheduled operations over any highway within his territory—or in other words, to conduct his operations in the form of regular-route operations between any points covered by his certificate. And this, even if by so doing he parallels the service rendered by any number of other carriers holding regular-route certificates for operations between the same points.

With this contention we cannot agree. To do so would grant to holders of irregular-route certificates a free hand to operate as they chose; to operate irregularly over such parts of the territory as they might choose and to establish regular-route operations where they so desired. An irregular-route certificate would be authority to conduct either or both forms of operation at the carrier's choice. It would nullify the distinction between regular and irregular route carriers and would nullify the power of the Commission

to establish and maintain comprehensive and efficient service adjusted to the public need and free from destructive competition between carriers.

The Act itself, Sect. 204 (b) (49 U. S. C. A. 304 (b), empowers the Commission to establish classifications of motor carriers, and pursuant to this authority the Commission has adopted definitions of the several classes of service, including:

> "An irregular-route radial-service carrier is any person who or which undertakes to transport property • • • over irregular routes from a fixed base point or points to points or places located within such radial area as shall have been fixed and authorized by the Interstate Commerce Commission in a certificate of public convenience and necessity. • • • or from any point within such radial area to such carrier's fixed base point or points."

It was operations of the sort described in the above definition which Draper had been conducting prior to June 1, 1935, and he procured a certificate for their continuance by virtue of the so-called "grandfather clause."

The Commission has also defined regular-route service as being that "which undertakes to transport property • • • between fixed termini and over a regular route or routes." This is further classified as being a scheduled or a non-scheduled service, dependent upon whether the service is upon a fixed schedule or at intermittent intervals. But the essential feature of any regular-route operations is that it shall be between fixed termini and over a regular route.

That the Commission has authority to make the above classifications and that they are proper distinctions in classes of service which will be recognized has been well settled by the decisions of the courts. See U. S. *v.* Maher, 307 U. S. 148; U. S. *v.* Carolina Carriers Corp., 315 U. S. 475.

In U. S. *v.* Maher, supra, as in the instant case, the contention of the carrier was in substantial effect that the right to operate irregularly within a specified territory

covered the right, at the will of the carrier, to operate between fixed termini and over regular routes within such territory. The Commission held that the services were of different nature and the Supreme Court, upholding this finding and giving recognition to the propriety of the difference in classification, said:

> "In differentiating between operations over 'the route or routes' for which an application under the 'grandfather clause' is made as against operations 'within the territory', Congress plainly adopted the familiar distinction between 'any-where-for-hire' bus operations over irregular routes and regular route bus operations between fixed termini."

In the instant case the report of the Commission states:

> "The radial irregular-route operating rights of Draper were confirmed under the 'grandfather clause.' The service rendered, and which provided the basis for such confirmation, was a-call-on-demand non-scheduled service to and from Roanoke and the numerous specified points, including an occasional interchange shipment to or from Lynchburg."
>
> * * * * * * *
>
> The use to which vendee would put these irregular-route operating rights would bear little resemblance to that which provided the basis for the confirmation of Lynchburg as one of the points served to and from Roanoke under the 'grandfather clause.' Without passing upon protestant's argument that irregular-route rights between these points were confirmed in Draper under the 'grandfather clause' in error, in our opinion it would be impossible for vendee to conduct irregular-route operations between these two specified points after the unification with its regular-route operations. This portion of the radial rights of Draper to and from Roanoke should be a part of the whole, as confirmed under the 'grandfather clause', if there is to be any possibility of preserving the irregular-route nature of the service authorized."

That it was within the functions of the Commission to make these findings there can be no doubt and there is nothing before us to indicate that its conclusions were arbitrary, capricious or without support in the evidence before it.

The plaintiffs supplement such arguments as have been heretofore indicated by a further one to the effect that the Commission's findings as to the intended use of the Draper right, by plaintiffs is an assumption; and that under Sect. 5 of the Act the Commission is required to approve or disapprove the transfer of operating rights as they find them "without assuming whether the carrier can or will operate the acquired rights in a lawful or unlawful way." That only after the consolidation has been effected can the lawfulness of the ensuing consolidated operation be questioned.

So far as the Commission's views as to the manner in which plaintiff would use the Draper rights are charged with being mere assumptions, this argument has little force in face of the fact that it is not denied that ever since plaintiffs leased these rights they have operated them in the manner found and that they desire and intend to so use them if permitted to purchase them, and that they have made at least two attempts to procure from the Commission formal approval of such use.

This argument is no doubt founded on the Old Colony Motor Lines, Inc. case, 39 M. C. C. 143, cited in the report of Division 4.

In that case an application was made for the purchase of certain irregular-route rights in the Boston and New York areas. The Commission expressed the opinion that, while the vendee intended to continue irregular-route operations in these areas it also intended to utilize the rights to be acquired to establish what amounted to a regular-route service between New York and Boston, which latter service would not be within the scope of the rights acquired. The Commission stated, however, that the vendee was entitled to the presumption that he would operate within the scope of his authority and until he had conducted his unified operations for sufficient length of time to enable a determination of whether he was or was not doing so, any conclusion of an unlawful operation would be premature. It

therefore approved the purchase, but with the specific provision that it was not to be construed as approving regular-route operations under the acquired irregular-route rights.

The difference between the conclusions in the Old Colony case and the instant one is that in the former the Commission, while recognizing the vendee's intentions, believed that, in the absence of any evidence of any unlawful operations actually conducted, the vendee was entitled to the presumption that it would operate within the scope of its authority. In the instant case the Commission has found that the plaintiffs, for an extensive period and ever since leasing the Draper rights, have operated in an unlawful manner, that they intend to continue to do so, and that it is impossible for them to operate otherwise. Any seeming inconsistency in the Commission's holdings in these two cases is no more than the difference between taking one course of action on evidence which is definite, conclusive and undisputed and the refusal to take similar action where the evidence is not conclusive. The difference between a case where the court believes that doubts exist to the benefit of which a party is entitled and which serve to restrain a judgment adverse to him, and a case where there are no doubts to serve in his favor. It is not uncommon for cases having analogous facts to have differing outcomes depending on the nature and the degree of conclusiveness of the evidence.

Sect. 5 (2) of the Act (49 U. S. C. A. 5 (2)) dealing with the mergers, leases, purchases, etc., of operating rights specifically provides that they shall be subject to the approval of the Commission. Obviously this approval must be given before the proposed merger or purchase is effected. Nor is it a perfunctory approval which must be given as a mere matter of form in all cases. It clearly is not contemplated, as plaintiffs apparently urge, that the Commission upon request must give approval to any contemplated transfer and wait until after it has been effected before deciding whether it results in a lawful operation and one consistent with the public interest.

There is nothing in the record before us which indicates that the Commission failed to give a fair and thoughtful consideration to plaintiffs' application or which supports

the assertion that its findings were arbitrary, irrational and contrary to law. The questions passed on were peculiarly within the function of the Commission and we are unable to see wherein there has been any abuse in the exercise of that discretion which has been entrusted to it by the terms of the statute.

It follows that the complaint should be dismissed and it will be so ordered.

December 21, 1946.

ARMISTEAD M. DOBIE,
*U. S. Circuit Judge;*
JOHN PAUL,
*U. S. Dist. Judge;*
A. D. BARKSDALE,
*U. S. Dist. Judge.*

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# In the Supreme Court of the United States

CASE NO. 1091

OCTOBER TERM, 1946

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C. W. FALWELL, JR., AND FALWELL FAST FREIGHT, INCORPORATED

APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL

APPELLEES

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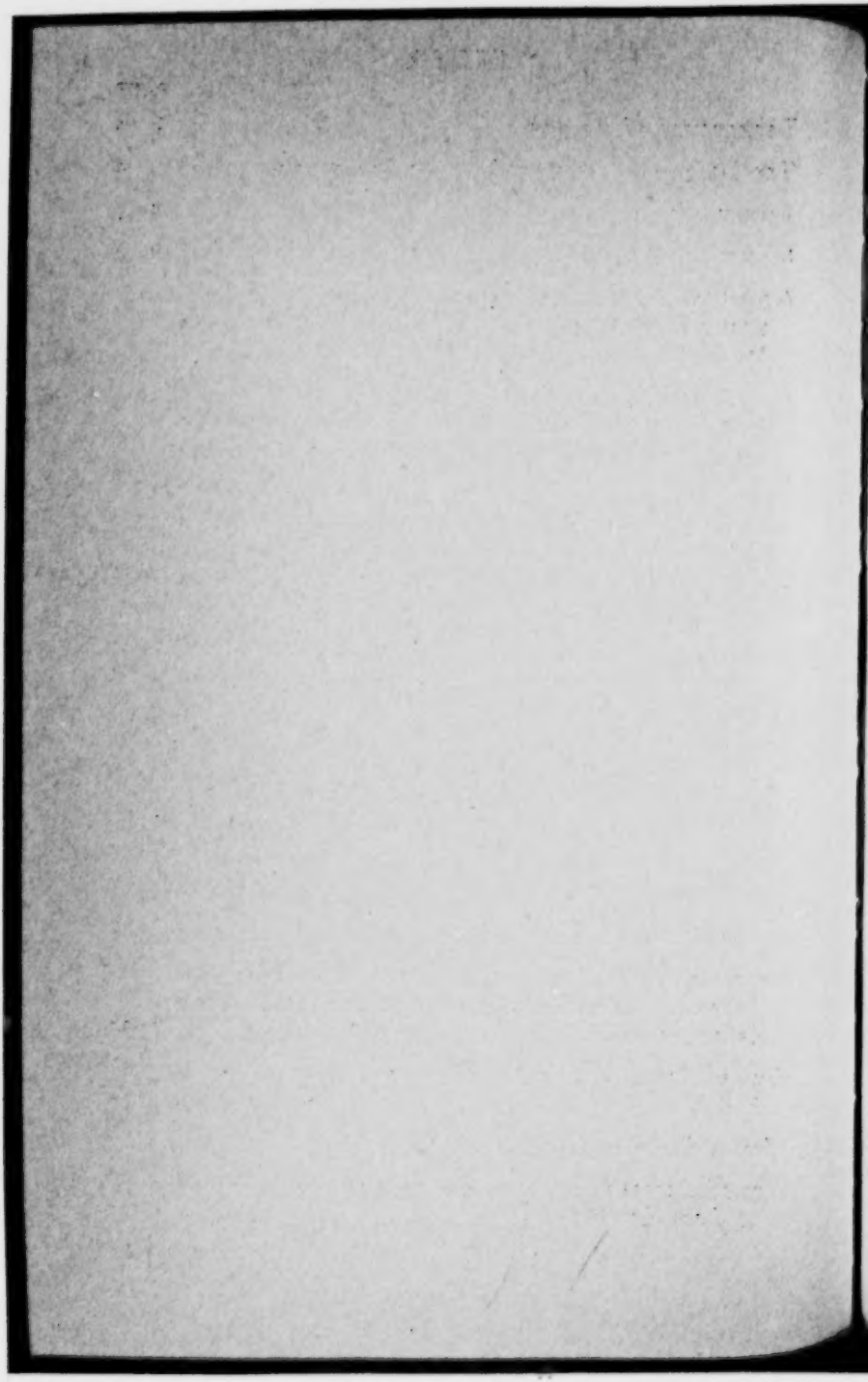
## BRIEF OF APPELLANTS OPPOSING THE MOTION TO AFFIRM FILED BY APPELLEES

J. P. BELL COMPANY, INC., PRINTERS, LYNCHBURG, VIRGINIA



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## BRIEF OF APPELLANTS OPPOSING THE MOTION TO AFFIRM FILED BY APPELLEES

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This is a direct appeal in Falwell, et al v. United States, et al, 69 F. Supp. 71, from the final decree dated December 21, 1946, of a specially constituted District Court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing Appellants' complaint for an order enjoining, setting aside and forever annulling the report and order of the Interstate Commerce Commission dated January 14, 1946, reported at 40 M.C.C. 489, reversing, in part, the report and order of Division 4 dated February 22, 1945, reported at 40 M.C.C. 127.

## BACKGROUND OF THE SUIT

The background of this suit will help to better understand the issues presented to this Honorable Court. On or about July 31, 1944, C. W. Falwell, Jr., and Falwell Fast Freight, Incorporated (hereinafter called Falwell), W. B. Draper, doing business as Draper Motor Service (hereinafter designated Draper) and Evans Lines, Incorporated, filed a joint application under Section 5 of the Interstate Commerce Act (49 USCA 5) with the Interstate Commerce Commission seeking approval of and authorization by the Commission for Falwell to purchase and Draper to sell a part of his certificate of public convenience and necessity authorizing interstate operation between Roanoke, Virginia, and Lynchburg, Virginia, over irregular routes, transporting general commodities.

Falwell applied to the Commission, under the provisions of Section 210a(b) of the Act (49 USCA 310a(b)) for temporary lease authority for a period of 180 days and the Commission, on the 26th day of August, 1944, granted the application of Falwell for temporary lease authority. Falwell instituted operations between Roanoke and Lynchburg in September 1944 under the temporary lease authority and Falwell conducted operations under the lease authority until February 21, 1945, when that authority automatically expired. On February 14, 1945, Falwell filed a petition with the Commission seeking to have the temporary lease authority extended for a period of 90 days beyond February 21, 1945, so as to prevent interruption of service by Falwell between Roanoke and Lynchburg and to allow the Commission additional time in which to dispose of the application to purchase on its own merits. Obviously, Falwell would have to disrupt the services and operation between Lynchburg and Roanoke, unless the Commission should, by February 22nd, 1945, at the latest, either (1) extend the lease authority, or (2) approve Falwell's purchase from Draper.

Consequently, Falwell would have discontinued operation between Roanoke and Lynchburg on February 21, 1945, but for the fact that on February 22, 1945, the telegram quoted below was received from the Commission. The telegram follows:

> "Retel MC-F-2600. Release made to press advising action Division Four authorizing Falwell purchase Draper and Evans operating rights subject condition respecting amortization increase intangible over five-year period. In view purchase authorization, petition extend lease denied. Please advise date consummation purchase. Copy report will follow. Refer F."

Therefore, to prevent any interruption in service between Roanoke and Lynchburg the purchase was consummated on February 22, 1945, and on February 22, 1945, Falwell began conducting operation in his own name and adopted and made them his own all tariffs, traffic agreements, et cetera, filed by Draper covering the operation between Roanoke and Lynchburg. The haste, therefore, in consummating the purchase was necessitated by the dire necessity of preventing any interruption in service between Roanoke and Lynchburg and not to strengthen the position of Appellants in this suit or before the Commission.

Protestants before the Commission, on March 9, 1945, after Falwell had consummated the purchase and conducted operations between Roanoke and Lynchburg for 16 days in his own name, filed a petition with the Commission seeking reconsideration of the report of Division 4 dated February 22, 1945, (40 M.C.C. 127) and the Commission, on May 7, 1945, granted the petition, but the order and report of Division 4 dated February 22, 1945, were not stayed. On January 14, 1946, the Commission, on reconsideration, denied the application of Falwell to purchase the operating rights of Draper and issued an order giving effect to the report of January 14, 1946, and that order was postponed from time to time, with a final

effective date of February 8, 1947. During the pendency of one of the orders postponing the effective date of the order of January 14, 1946, this suit was instituted on July 7, 1946, in the District Court for the Western District of Virginia.

## THE ONLY ISSUES PRESENTED TO THE COMMISSION

Section 5 of the Act (49 USCA 5), the section of the Act under which the application to purchase the operating rights of Draper was filed, provides only two issues and those issues are:

(1) Is the proposed purchase by Falwell and the proposed sale by Draper of a part of his certificate to Falwell covering his operating rights between Roanoke and Lynchburg within the scope of Section 5 (2) (a) of the Act, and

(2) Will it be consistent with the public interest for Falwell to purchase and conduct whatever operations between Roanoke and Lynchburg that Draper is authorized to perform in the place of Draper?

No other issues than those provided in Section 5 of the Act were presented to the Commission or were proper for consideration in this proceeding. Division 4 of the Commission, on February 22, 1945, found the transactions within the scope of Section 5 (2) (a) and to be consistent with the public interest, and approved the purchase and authorized the transfer of the certificate from Draper to Falwell to be effective upon consummation of the purchase.

## FOREIGN ISSUES

The protestants, by their petition for reconsideration of March 9, 1945, raised issues foreign to the issues set forth in Section 5 of the Act (49 USCA 5), which foreign issues caused the Commission, on January 14, 1946, to render a

report and order denying Falwell the right to purchase from Draper his operating rights between Roanoke and Lynchburg. The report and order of January 14, 1946, contrary to the narrow issues contained in Section 5 of the Act (49 USCA 5), did:

(a) Suspend or terminate a certificate of public convenience and necessity, or its equivalent, the authority under which Falwell had conducted operation between Roanoke and Lynchburg for over 10 months in his own name, contrary to the provisions of Section 212 (a) of the Act (49 USCA 312 (a));

(b) Impose limitations and restrictions upon the kind of service that Draper could render differing from the kind of service Draper is specifically authorized in his certificate to render, contrary to the provisions of Section 208 (a) of the Act (49 USCA 308 (a)) and contrary to the provisions of Draper's certificate;

(c) Construe the term "irregular routes," the routes over which Draper is authorized in his certificate to operate between Roanoke and Lynchburg in rendering common carrier service, to mean "service" and not highways over which Draper must operate, contrary to the specific provisions of Section 208 (a) of the Act (49 USCA 308 (a));

(d) Impose, in determining the kind of common carrier service to be rendered by a carrier, a different test for common carriers authorized to operate over irregular routes than the test used for common carriers authorized to operate over regular routes, which is contrary to the provisions of Section 203 (14) of the Act (49 USCA 303 (14)) and to the provisions of Sections 206 (a) and 208 (a) of the Act (49 USCA 306 (a) and 308 (a)); and

(e) Determine the operating rights granted to Draper, contrary to the last ordering paragraph of the order of February 22, 1945, which ordering paragraph

the Commission adopted as its own in its report and order of January 14, 1946, which paragraph follows:

> "And it is further ordered, That nothing herein contained shall be construed as a determination of the operating rights of any person or persons under any section of the Act except Section 5 thereof, as expressly determined herein."

Notwithstanding the fact that the Commission specifically ordered that nothing contained in the report and order of February 22, 1945, and of January 14, 1946, shall be construed as a determination of the operating rights of any person or persons, the fact remains that the report and order of January 14, 1946, have formed the nucleus for the Commission to draw a line of demarcation between the kind of service a carrier authorized to operate over irregular routes may render and the kind of service a carrier authorized to operate over regular routes may render. Therefore, if the report and order of January 14, 1946, did not determine the operating rights of Draper and those of Falwell; did not impose limitations and restrictions upon the kind of service Draper could render differing from the kind of service a regular route carrier may render; did not construe "irregular routes" to mean "irregular route carrier service"; and did not impose a different test for irregular route carriers than the test used for regular route carriers in determining the kind of service each is to render, then why were the report and order of January 14, 1946, and the decree of the District Court in this proceeding used to support the report and order of the Commission dated February 3, 1947, in Docket MC-C-246, Transportation Activities of Brady Transfer and Storage Company? In the Brady Case supra, at sheet 14 of the report, the following appears:

> "The argument of some opposed to our tentative conclusions that a grant of irregular-route authority

allows a carrier to perform *any* service in *any* manner it desires over any route it chooses within the territorial and commodity limits of its certificate or permit will next be discussed. * * Clearly, particularly in the light of the Falwell Case above quoted, it has no merit but it is seriously urged and will be discussed."

Therefore, the report and order in 40 M.C.C. 489, dated January 14, 1946, are erroneous as a matter of law, as they:

(a) Suspend or terminate a certificate or its equivalent;

(b) Determine the kind of operating rights granted to Draper;

(c) Determine how Draper is to use those rights;

(d) Determine the kind of service a regular route carrier and an irregular route carrier may render;

(e) Impose limitations and restrictions upon the kind of service Draper and Falwell can render differing from the kind of service they are authorized to render in their certificates;

(f) Are inconsistent with the definition of "consistent with the public interest" as used by the Supreme Court of the United States in *U. S.* v. *Lowden*, 308 U. S. 25; and

(g) Are contrary to the specific provisions of Section 5 of the Act (49 USCA 5).

## MOTION OF APPELLEES

The motion to affirm, filed by Appellees, contains four points, which are:

(1) That the report and order of Division 4 of February 22, 1945, were reviewable by the full Commission and were not a certificate;

(2) That the Commission did not commit error when it recognized and applied the distinction between regular and irregular route service;

(3) That the Commission's report and order of January 14, 1946, are not contrary to the provisions of Section 5; and

(4) That the findings of the Commission must be accepted as true in the absence here of the complete record made before the Commission.

## APPELLEES AVER THAT THE REPORT AND ORDER OF DIVISION 4 OF FEBRUARY 22, 1945, WERE REVIEWABLE BY THE FULL COMMISSION AND WERE NOT A CERTIFICATE

The report and order of January 14, 1946, are erroneous as a matter of law, as they are contrary to the specific provisions of the statute.

Congress provided, in Section 206 (a) of the Act (49 USCA 306 (a)), that no common carrier by motor vehicle *shall* engage in interstate operation unless there is in force with respect to such carrier a certificate authorizing such carrier to engage in interstate operation. Consequently, when the Commission permitted Falwell, pursuant to the report and order of February 22, 1945, to consummate the purchase, to file tariffs in his own name, to actually engage in interstate operation between Roanoke and Lynchburg, and to exercise all the rights and privileges incident to the ownership of the operating rights between Roanoke and Lynchburg, the Commission thereby made the authority granted on February 22, 1945, a certificate within the meaning of Section 206 (a) of the Act, because the Commission is without statutory authority to authorize Falwell to engage in interstate operation unless at the same time the Commission issues a certificate to Falwell (Section 206 (a)) of the Act (49 USCA 306 (a)).

Congress provided that no carrier shall engage in interstate operation without a certificate and then provided in Section 212 (a) of the Act (49 USCA 312 (a)) that a certificate shall be effective from the date specified in the

certificate and that it shall remain in effect until suspended or terminated as specifically provided in Section 212 (a) of the Act. The Commission, on February 22, 1945, did authorize Falwell to engage in interstate operation and provided upon the consummation of the purchase that Falwell would be entitled to a certificate covering the Draper rights, which purchase Falwell did consummate on February 22, 1945, and on that date did actually begin to engage in interstate operation between Roanoke and Lynchburg. Consequently, the report and order of January 14, 1946, are erroneous as a matter of law, as they seek to suspend or terminate a certificate issued on February 22, 1945, and effective upon consummation of the purchase on February 22, 1945, contrary to the procedure provided in Section 212 (a) of the Act (49 USCA 312 (a)) for suspension or termination of a certificate.

Congress provided in Section 17 (6) of the Act (49 USCA 17 (6)) that any decision, order, or requirement made by the Commission or a division thereof is subject to an application for rehearing, reargument, or reconsideration, but Congress did not make a certificate issued under Section 206 (a) of the Act (49 USCA 306 (a)) subject to an application for rehearing, reargument, or reconsideration, because a certificate is nowhere mentioned in Section 17 of the Act (49 USCA 17) as being subject to an application for rehearing, reargument, or reconsideration.

A decision, order, or requirement of the Commission granting operating authority to a carrier authorizing the carrier to engage in interstate operation *is not subject to review* under the provisions of Section 17 of the Act, because such an order, decision or requirement, after it becomes effective and operations thereunder are being conducted, ceases to be an order, decision, or requirement and becomes a certificate within the meaning of Section 206 (a) of the Act (49 USCA 306 (a)) and that authority can only be suspended or terminated in accordance with the provisions of Section 212 (a) of the Act (49 USCA 312 (a)) and not by the provisions of Section 17 of the Act.

A decision, order, or requirement granting operating authority *is not subject to review* by the Commission, as Section 210a (a) of the Act (49 USCA 310a (a)) authorizes the Commission to grant temporary authority without hearings or other proceedings and that section provides that such authority shall be valid for such time as the Commission shall specify unless revoked or suspended for good cause. Therefore, if Section 17 applies to operating authority then temporary operating authority could never be granted without a hearing and the proceeding kept open waiting for an application for review.

Therefore, as Falwell was authorized on February 22, 1945, to engage in interstate operation, the minute Falwell consummated the purchase on February 22, 1945, a certificate was automatically issued to him, which certificate marks the end of that proceeding and such a certificate is not subject to an application for rehearing, reargument, or reconsideration.

Congress provided in Section 221 (b) of the Act (49 USCA 321 (b)) that all orders of the Commission shall take effect within such reasonable time, not less than 30 days, as the Commission may prescribe, but a certificate required by Section 206 (a) of the Act and issued pursuant to Section 208 (a) of the Act (49 USCA § 306 (a) and 308 (a)) may become effective at the pleasure of the Commission, as a certificate is not an order, consequently, a certificate is not subject to a waiting period of 30 days before becoming effective. Falwell was authorized to engage in interstate operation upon consummation of the purchase, which operation could not have been authorized without the issuance of a certificate to Falwell. Therefore, when Falwell consummated the purchase and began to engage in interstate operation on February 22, 1945, that operation was being conducted by virtue of a certificate and not by an order, as the Commission could not authorize Falwell to engage in interstate operation on an *order* issued by the Commission. Consequently, the operating au-

thority became effective upon consummation and that authority is subject to the provisions of Section 212 (a) of the Act and not subject to the provisions of Section 17 of the Act or Section 221 (b) of the Act.

The decision of this Honorable Court in *Baldwin* vs. *Milling Co.*, 307 U. S. 478, to which appellees refer, apparently has no application here, as an order of the Commission is not involved here as it was involved in the *Baldwin* vs. *Milling Co. Case supra,* for the simple reason that the Commission cannot, by an order, authorize a carrier to engage in interstate operation, as such operation must be authorized by a certificate. Consequently, the referred-to decision apparently has no application whatever to the issues involved in this suit as the issuance of a certificate and not an order is involved in this suit. Nor do we think the decisions of this Honorable Court in *Baltimore & Ohio Railroad Company* vs. U. S., 298 U. S. 249, 370-1; *Federal Radio Commission* v. *Nelson Brothers,* 289 U. S. 266 285-6, have any application to this suit because this proceeding does not involve *an order* of the kind referred to in Section 17 of the Act (49 USCA 17), as this proceeding concerns the issuance of authority to engage in interstate operation which operation can only be authorized by a certificate. Consequently, the action of Division 4 of February 22, 1945, was not subject to review by the Commission after Falwell consummated the transactions because the operation authorized could only be conducted by virtue of a certificate and not by a mere order of the Commission. As a matter of fact, the report and order of Division 4 of February 22, 1945, granted Falwell the same kind of operating authority, although the evidence of the authority was not physically issued to Falwell, as the authority the Commission granted Seatrain, which authority this Honorable Court, in *U. S.* v. *Seatrain Lines, Inc.,* 91 Law Ed. 311 decided January 6, 1947, held could not be revoked by the Commission.

## APPELLEES AVER THAT THE COMMISSION DID NOT COMMIT ERROR WHEN IT RECOGNIZED AND APPLIED THE DISTINCTION BETWEEN REGULAR AND IRREGULAR ROUTE SERVICE

There is no statutory difference, for instance, between a common carrier by motor vehicle operating *over specified routes* between Lynchburg and New York with service at intermediate points and a carrier operating over *irregular routes* between Roanoke and Lynchburg with no service at intermediate points *as to the quantity and quality of service to be rendered.* In each instance, each carrier is to operate between designated points, rendering the same "common carrier service" and it is just as reasonable to say that a *regular route carrier is operating "radially"* between Lynchburg and New York, as it is to say that an *irregular route carrier is operating "radially"* between Roanoke, on the one hand, and Lynchburg, on the other. There is no statutory authority for drawing a line of demarcation between the kind of "common carrier service" a carrier may render operating between New York and Lynchburg over regular routes and the kind of service a carrier may render operating between Roanoke and Lynchburg over irregular routes, notwithstanding the fact that one carrier is to operate over specified routes and the other carrier is not authorized to operate over specified routes because in the language of the statute both carriers are common carriers by motor vehicle. Section 203 (14) of the Act (49 USCA 303 (14)) does not make any distinction between a "common carrier by motor vehicle" over regular routes and a "common carrier by motor vehicle" over irregular routes *as to the service to be rendered* nor does Section 204 (b) of the Act (49 USCA 304 (b)) delegate to the Commission authority to classify one carrier as a *radial carrier* and another carrier

as a *non-radial carrier* when, as here, the operation of each carrier is between designated points. Moreover, the certificate issued to Draper under his grandfather application does not designate Draper as a *radial carrier between Roanoke and Lynchburg* any more or less than the certificate issued to Falwell covering operation between Lynchburg and New York designates Falwell as a *non-radial carrier.* Consequently, there is no statutory difference in the service to be rendered by a carrier operating over irregular routes between designated points and a carrier operating over regular routes between designated points.

Congress provided in Section 204 (b) of the Act (49 USCA 304 (b)) that the Commission may classify carriers included in the term "common carrier by motor vehicle" and, pursuant to that authority, the Commission has undertaken to classify common carriers by motor vehicle but that classification, even if reasonable, is of no effect, as a matter of law, unless the classification so made is specifically written into each certificate issued to each carrier, as Section 208 (a) of the Act (49 USCA 308 (a)) makes it mandatory upon the Commission to specify in each certificate the service to be rendered by a carrier and to specify in the certificate the route or routes, if any, over which or the territory within which the operation is to be conducted. Therefore, the Commission cannot, by administrative action, impose limitations and restrictions upon the kind of service a motor carrier can render unless the Commission has specifically incorporated those limitations and restrictions in a certificate that it has issued to a motor carrier.

Congress provided in Section 208 (a) of the Act (49 USCA 308 (a)) that all *certificates* issued under Sections 206 or 207 *shall* specify two things and those two things are: (1) *the service to be rendered* and (2) *the routes over which,* the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, the

motor carrier is authorized to operate or, in case of operation not over specified routes or between fixed termini, *the territory within which*, the motor carrier is authorized to operate. Therefore, a certificate is required to specify the kind of service a motor carrier is to render and then to specify the routes over which the operation is to be conducted or, in case of operation not over specific routes, then the territory within which the operation is to be conducted. Pursuant thereto, the Commission has specified *in the carrier's certificate*, for all common carriers by motor vehicles, only *one class of service to be rendered* by all carriers and then named the specific routes over which some carriers are to operate and, as to other carriers, no specific routes over which to operate were named for them. The carriers for whom specific routes were named are designated "regular route" carriers and the carriers for whom no specific routes over which to operate were named are designated "irregular route" carriers. But the Commission, in this proceeding, has construed "irregular routes" to mean "irregular route carrier service" and "regular routes" to mean "regular route carrier service" contrary to the terms and conditions of the carrier's certificate and the statutory mandate that the certificate shall specify: (1) the service to be rendered and (2) the routes over which or the territory within which the carrier is authorized to operate.

In this view, we have the *full* support of the Interstate Commerce Commission in Consolidated Freight Lines, Incorporated, Common Carrier Application; No. MC 42487, 11 M.C.C. 131, where the Commission said:

> "The term 'route' is not defined in the act. 'Highway' is defined in section 203 (a) (12) as 'the roads, highways, streets, and ways in any State.' In our *certificates we have described routes in terms of particular highways, just as railroad routes, under Part I, are described in terms of particular lines, of railroad.* • •

> "Clearly, it is contemplated that where specified points are to be served, *the 'routes over which' the service is to be rendered shall also be named,* and we know of no way of describing routes for motor carriers except in terms of highways." (Italics added.)

Moreover, Section 203 (14) of the Act, in defining a common carrier by motor vehicle, does not draw a line of demarcation between the kind of service that an irregular route carrier may render and the kind of service that a regular route carrier may render, as both carriers are defined in that section to be any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate commerce of property for compensation whether over regular or irregular routes.

The Supreme Court in *U. S.* v. *Carolina Carriers Corporation,* 315 U. S. 475, in dealing with the difference between an irregular route carrier and a regular route carrier, said:

> "The statutory differences lie only in the territorial scope and pattern of operation."

The territorial scope of a regular route carrier is between fixed termini and the territorial scope of an irregular route carrier is the territory within which the carrier is authorized to operate. The pattern of operation is the *route or routes* over which operation is to be conducted as set forth by the Circuit Court of Appeals (Eighth Circuit) in *Consolidated Freightways, Inc.,* v. *United States,* 136 F. 2d 921 (923), (Petition for writ of certiorari denied 320 U. S. 781), as follows:

> "The words *'route and routes'* are manifestly used *to signify* the *highways where the motor vehicles operate.* * * The *Commission has consistently so construed the law* in its administration." (Italics added.)

The Commission in dealing with *service*, in 32 M.C.C. 199, Jack Cole Company, Common Carrier Application, said:

> "In this connection it may be well to point out that 'service' when applied to a point or place in connection with motor-carrier operations contemplates *interchange with connecting carriers* at such point or place, as well as the *delivery of goods to a consignee* or the *acceptance of goods* for transportation *from a shipper* at such point or place, and such other details as are incidental to the delivery or receiving of the goods."

Therefore, the report and order of January 14, 1946, are erroneous as a matter of law in that the Commission has construed the *pattern of operation* to mean the *quality and quantity of service* to be rendered rather than construing operation to mean the route or routes over which the operation is to be conducted or the territory within which the operation is to be conducted.

## APPELLEES AVER THAT THE COMMISSION'S REPORT AND ORDER OF JANUARY 14, 1946, ARE NOT CONTRARY TO THE PROVISIONS OF SECTION 5

Congress provided in Section 5 (2) (a) of the Act (49 USCA 5 (2) (a)) that a carrier may sell and transfer to another carrier *all* or *any part of a certificate* issued to such a carrier without regard to whether the carrier conducts operation between fixed termini, within a territory, or otherwise, as a regular route carrier, irregular route carrier, or otherwise. Therefore, by the clear provisions of the statute, Draper has the right to sell *any part* of his operating rights and Falwell has the right to purchase any part of the operating rights of Draper that Draper desires to sell.

The certificate issued to Draper is divisible or severable as the certificate authorizes common carrier transportation

service between fixed termini which service is required to be rendered over irregular routes. The certificate authorizes Draper to conduct common carrier service between Roanoke, Virginia, on the one hand, and Lynchburg, on the other, and between Roanoke, Virginia, on the one hand, and 26 additional specified points, on the other. The certificate does not authorize Draper to conduct operation between Roanoke, Virginia, and Richmond, for instance, with service at Lynchburg because the certificate does not permit service to be rendered at any intermediate point when operating between Roanoke and one of the 27 specified points. In other words, the operation must be conducted between Roanoke, on the one hand, and each of the 27 specified points, on the other, in separate and distinct operation. Each of the 27 points is a separate unit and the sale of any one or more of the 27 separate units will not in any way impair or interfere with the operation of each of the unsold remaining units.

Division 4 on February 22, 1945, rendered a report and order and granted Appellants a certificate to engage in interstate operation between Roanoke and Lynchburg which report, order, and certificate were in full compliance with the provisions of Section 5 of the Act. However, the Commission, on January 14, 1946, contrary to the specific provisions of Section 5 of the Act (49 USCA 5) considered "consistent with the public interest" to mean whether the operation by Appellants of the Draper rights under the facts and circumstances of this case would necessarily, as protestant claims, involve a conversion of irregular-route operations thereunder into regular-route operations and whether Draper may split, as alleged, his radial irregular route rights in the manner proposed. Therefore, a determination of the two named issues necessarily involved a determination of the operating rights of Draper and those of Falwell and a determination of the kind of service a regular route carrier and an irregular route carrier may render contrary to the specific provisions of Section 5 of

the Act (49 USCA 5) and the last ordering paragraph of the report and order of February 22, 1945, as follows:

> "And it is further ordered, That nothing herein contained shall be construed as a determination of the operating rights of any person or persons under any section of the Act except Section 5 thereof, as expressly determined herein."

Notwithstanding the provisions of Section 5 of the Act and the referred-to order, the Commission specifically determined the operating rights of Draper as follows:

> "The radial irregular-route operating rights of Draper were confirmed under the 'grandfather' clause. The service rendered, and which provided the basis for such confirmation, was a call-on-demand non-scheduled service to and from Roanoke and the numerous specified points. * * The volume of traffic which Draper may have transported in interstate commerce between Lynchburg and Roanoke is not shown, but it is apparent that any such traffic must have been interchange traffic. As the operating rights were granted on the basis of irregular-route operations (not radial), and considering the only available practical highway, it must be assumed that the basis for irregular-route rights (not radial) was that the demand for his service in moving interchange traffic to and from Lynchburg and Roanoke was sporadic, and Lynchburg was named along with numerous other points. * * The use to which vendee would put these irregular-route operating rights (not radial) would bear little resemblence to that which provided the basis for the confirmation of Lynchburg as one of the points served to and from Roanoke under the 'grandfather' clause." ("Not radial" added for emphasis.)

Therefore, the report and order of January 14, 1946, contain information that conclusively shows, upon the face of them, that they are erroneous as a matter of law and

must be set aside as they determine operating rights, impose limitations upon the future growth of a carrier contrary to the last provisions of Section 208 (a) of the Act (49 USCA 308 (a)), and determine the kind of service a carrier over regular routes and a carrier over irregular routes may render.

The imposition of the aforesaid limitations upon the certificate issued to Draper is in fact and substance a revocation of the certificate issued to Draper.

## APPELLEES AVER THAT THE FINDINGS OF THE COMMISSION MUST BE ACCEPTED AS TRUE IN THE ABSENCE OF THE COMPLETE RECORD MADE BEFORE THE COMMISSION

Appellees rely upon the decision of this Honorable Court in *Mississippi Valley Barge Line Co.* v. *U. S.*, 292 U. S. 282, 286; *Howard Hall Co., Inc.* v. *U. S.*, No. 627, October Term 1945, affirmed May 6, 1946, in support of their motion to affirm because Appellants did not offer in evidence before the District Court the complete record made before the Commission. The findings of fact are set forth in the report and order of the Commission of January 14, 1946, and the conclusions reached by the Commission from those facts are set forth in the report and order of the Commission dated January 14, 1946, which conclusions are erroneous as a matter of law based upon the facts contained in the report. Consequently, the complete record before the Commission was not necessary to prove errors of law apparent upon the face of the decision of the Commission.

## CONCLUSION

Section 5 of the Act (49 USCA 5) concerns the issue of whether a proposed consolidation or merger of the certificates of two or more carriers is "consistent with the

public interest" and, as the report and order of January 14, 1946, deal with the difference between the kind of service an irregular route carrier may render and the kind of service a regular route carrier may render, they are erroneous as a matter of law, as they deal with issues foreign to the issues raised under Section 5. Because a proceeding under Section 5 of the Act cannot be made the vehicle to determine the power and the authority of the Commission to classify the kind of service a common carrier may render and as the decree of the District Court in this suit is apparently being used to support a report and order of the Commission dated February 3, 1947, in Docket No. MC-C-246, Transportation Activities of Brady Transfer and Storage Co., which will carry into effect such a classification, the report and order of January 14, 1946, are not responsive to the provisions of Section 5 of the Act, and they must be set aside as a matter of law.

The report and order of January 14, 1946, are based upon and decide issues foreign to the issues raised under Section 5 of the Act, which decision on the foreign issues makes this suit of national importance to the motor carrier industry, as the decree in this suit of the District Court has been used to support, in part at least, a report and order of the Commission dated February 3, 1947, in Docket No. MC-C-246, Transportation Activities of Brady Transfer and Storage Company.

In the Brady Case supra, at sheet 5 of the mimeographed report of February 3, 1947, the Commission said:

> "The proceeding did, however, afford an occasion for examination of the much broader issue, this is, the general question of what constitutes a regular-route operation in contrast to an irregular-route operation, or the line of demarcation between regular- and irregular-route operations. Because of the nation-wide importance of this broader question, we elected to issue a report indicating only *tentative* conclusions. Such tentative report was accompanied by a "Notice

> to the Public" calling attention to the proposed findings and inviting all interested persons and public bodies, without the necessity of formal intervention, to file exceptions thereto or briefs on the general subject 'of what constitutes a regular-route operation service in contradistinction to an irregular-route operation'."

Therefore, as the decree in this suit of the District Court has been used to support, in part, a report and order of the Commission which report and order involve a question of nation-wide importance, this suit is relegated to a suit containing questions of national importance and suggests that the suit should be heard and decided by this Honorable Court.

Moreover, the importance of this suit to the entire motor carrier industry and to the general public is recognized by the fact that the Irregular Route Motor Carrier Conference and the Regular Route Motor Carrier Conference, no doubt, will file briefs *amicus curiae* in this suit. Therefore, this suit is of national importance and should be heard on its merits. Then too, construing the words *route* or *routes* to mean *service* is contrary to the decision of the Commission in Consolidated Freight Lines Case, 11 M.C.C. 131, where the Commission said that:

> "In our certificates we have *described routes in terms of particular highways.*" (Italics supplied.)

Consequently, the report and order of January 14, 1946, are contrary to decisions of the Commission and to statutory provisions. The Motion to Affirm should be denied and we so pray.

Respectfully submitted,

C. W. FALWELL, JR., AND
FALWELL FAST FREIGHT, INCORPORATED

By: JOHN D. EASLEY AND W. G. BURNETTE
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Lynchburg, Va., March 18, 1947

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No. 1091

# In the Supreme Court of the United States

OCTOBER TERM, 1946

C. W. FALWELL, JR., AND FALWELL FAST FREIGHT, INC., APPELLANTS

*v.*

THE UNITED STATES OF AMERICA ET AL.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA*

MOTION TO AFFIRM

# In the District Court of the United States for the Western District of Virginia

CIVIL NO. 178

C. W. FALWELL, JR., AND FALWELL FAST FREIGHT, INC., PLAINTIFFS-APPELLANTS

*v.*

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

## MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree, dated December 21, 1946,[1] of a specially constituted District Court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellants' complaint to set aside an order of the Interstate Commerce Commission. Appeal was allowed on February 1,

[1] The Court also rendered an opinion on the same date.



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1947, and appeal papers were served on February 11, 1947.[2]

The Commission's order dated January 14, 1946 was made in a proceeding under Section 5 of the Interstate Commerce Act as amended (49 U. S. C. 5). The order denied appellants' application for authority to purchase a portion of the operating rights of W. B. Draper, a motor carrier, doing business as Draper Motor Service.

Falwell Fast Freight, Inc. (hereinafter called Falwell), is a motor carrier holding authority, under its own operating rights, to transport general commodities over a regular route between Lynchburg, Virginia and New York City. Acquisition by Falwell of the operating rights of one Evans as a regular route carrier, between Bluefield, West Virginia and Roanoke, Virginia, was authorized by the order here under review, but that part of the order was not assailed and is not involved in the pending suit. The rights which Falwell sought to acquire from Draper, but which were denied by the Commission's order under review, covered irregular route operation between Roanoke and Lynchburg; such rights being a portion of Draper's irregular route

[2] It does not appear that notice of appeal was served upon the Attorney General of the Commonwealth of Virginia, in accordance with the provisions of 28 U. S. C. 45a. No citation on appeal has been served; nor did the jurisdictional statement have appended thereto a copy of the opinion of the court below as required by Rule 12.

authority to operate "radially"[3] between Roanoke, on the one hand, and, on the other, Lynchburg, Richmond, and numerous other points. Draper undertook to transfer to Falwell only the right to operate between Roanoke and Lynchburg. Draper retains all its other rights, including the right to operate between Roanoke and Richmond. This operation to Richmond would involve use between Roanoke and Richmond of the same highway (No. 460) which would be used by Falwell in operating the transferred rights. Thus in effect, insofar as physical operations on the highway are concerned, Draper would still retain the right to duplicate the operation sought to be transferred to Falwell.[4]

By virtue of temporary authority granted by the Commission, Falwell had been conducting operations over the Draper rights between Lynchburg and Roanoke; and the Commission had before it in the instant proceeding extensive

[3] The Commission has classified as "radial" that type of operation which is conducted between a central "base area" and an outlying "peripheral area." Radial operation is analogous to movement along the spoke of a wheel, between the hub and the circumference. Conversely, the pattern of operation is designated as "non-radial" when transportation is furnished between any points lying within the territory which a carrier serves. See *Classification of Motor Carriers*, 2 M. C. C. 703, 709; *Gonce* v. *United States*, 48 F. Supp. 286 (D. Mass., 1942).

[4] Though Draper, after the transfer, would not be authorized to handle Lynchburg traffic while serving Roanoke and Richmond.

evidence regarding the manner and character of Falwell's use of the Draper rights. Falwell's testimony on that subject at the hearing before the Commission disclosed even more vividly than the Commission's findings in its report the fact that Falwell's actual operations over the Draper rights between Lynchburg and Roanoke under temporary authority had been conducted in such a manner as practically to obliterate the distinction between regular and irregular route service.[4] This testimony showed also that, if the application were granted, Falwell intended to continue operation over the Draper rights in the same manner as operations had been conducted under the temporary authority. The Commission made findings in accordance with this testimony.

However, inasmuch as appellants did not offer in evidence before the District Court the complete record made before the Commission, they are precluded from attacking the Commission's findings, which must be accepted as true. *Mississippi Valley Barge Line Company* v. *United States,* 292 U. S. 282, 286; *Howard Hall Co., Inc.* v. *United States,* No. 627 October Term 1945, aff'd May 6, 1946.

Appellees submit that the appeal presents no substantial question, and that the judgment of the

[4] The testimony indicated that Falwell's through operation between Lynchburg and Roanoke in continuation of regular route schedules coming into those cities off the Falwell or Evans routes was limited only by the war-time lack of available equipment (Tr. 50, 51, 68).

District Court should be affirmed. Appellants raise three points in the assignments of error set forth in their petition as amended:*

1. That the report and order of Division 4 of the Commission, entered February 22, 1945, are to be treated as constituting in fact and substance a certificate of public convenience and necessity, revocable only under Section 212 (a) of the Interstate Commerce Act as amended (49 U. S. C. 312 (a)).

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* These assignments are set forth in the following language:

(a) That the report and order of the Commission, acting through Division 4, of February 22, 1945, were, in their nature and effect, a certificate of public convenience and necessity within the meaning of the statutory provisions;

(b) That the report and order of the Commission, acting through Division 4, of February 22, 1945, are not subject to the provisions of Section 17 of the Act (49 USCA 17), as the report and order of the Commission, acting through Division 4, of February 22, 1945, are subject to the provisions of Section 212 (a) of the Act (49 USCA 212 (a)) and can be suspended or terminated only as specifically provided in the aforenamed section;

(c) That there is no satutory authority for the Commission to alter or trim down a certificate of a carrier by imposing limitations and restrictions upon the kind of service that the said carrier can render differing from the kind of service that the certificate authorizes the carrier to render, as the Commission has done with respect to the kind of service capable of being rendered under the certificate issued to Draper; and

(d) That the report and order of the Commission dated January 14, 1946 are contrary to the provisions of Section 5 of the Act (49 USCA 5).

2. That the order made by the full Commission on January 14, 1946, upon reconsideration of the prior order of Division 4, is invalid because based upon an erroneous conception of the kind of service that an irregular route carrier may render.

3. That the full Commission's order, denying approval of the proposed transfer of operating authority, was not in conformity with the requirements of Section 5 of the Act (49 U. S. C. 5).

As to appellants' first contention, it is clear that the order of Division 4 was reviewable by the full Commission, and was not a "certificate."

It is plainly provided in Section 17 of the Act (49 U. S. C. 17), relating to Commission procedure, that the decision of a Division of the Commission is subject to reconsideration by the full Commission. It is not disputed that a timely petition for reconsideration, complying with the requirements of Rule 101 of the Commission's Rules of Practice, was filed by Brooks Transportation Company, intervening defendant in this case, a protestant in the proceedings before the Commission. Pursuant to such petition the matter was reopened for reconsideration by the full Commission; and the full Commission, disagreeing with the conclusions of Division 4, decided to disapprove the proposed transfer of operating authority.

Obviously Falwell could not oust the Commission of its statutory jurisdiction by undertaking

to consummate the transaction in accordance with the decision of Division 4, while that decision was still subject to reconsideration by the full Commission. Falwell was clearly acting at its own risk and peril in seeking to effect the transfer of Draper's rights prior to the expiration of the time within which petitions for reconsideration might be filed.

This conclusion follows *a fortiori* from the holding in *Baldwin* v. *Milling Co.*, 307 U. S. 478. In that case a shipper was required to repay money actually paid to it as reparation, when the Commission two years later reopened the case and reversed its previous decision that the rates charged by the carrier had been unreasonable. In the case at bar there is some question as to whether Falwell actually paid over the purchase price.

It is inconceivable that, by reason of Falwell's haste in acting upon the decision of Division 4, the full Commission should be deprived of its statutory power of review. As well might it be argued that the Supreme Court's appellate jurisdiction can be defeated by prompt action taken by a litigant in reliance upon the judgment of a subordinate tribunal, when the time within which an appeal from the court below may be taken has not expired and such an appeal is subsequently taken. It is established law that the Commission is not bound by the proposals and recommendations of its examiners or Divisions,

when they are subsequently superseded by the final action of the full Commission. *Baltimore & Ohio Railroad Co.* v. *United States,* 298 U. S. 349, 370–1; *Federal Radio Commission* v. *Nelson Bros.,* 289 U. S. 266, 285–6.

In the Commission's practice a clear distinction has always been made between an order authorizing issuance of a certificate, and the certificate itself, a separate document. Any doubt as to this distinction has been set at rest by the recent decision in *United States* v. *Seatrain Lines, Inc.,* No. 61, October Term 1946, decided January 6, 1947. Appellants' entire argument with respect to the revocability of certificates under Section 212 (a) of the Act is predicated upon the unsound assumption that the report and order of Division 4 approving the transfer of Draper's rights to Falwell, constituted in legal contemplation a "certificate."

The Commission's practice is shown by the fact that a certificate was issued by the Commission to Falwell on August 9, 1946, covering his own prior rights and also those acquired from Evans. Exhibit A to Answer of Interstate Commerce Commission. In this certificate the Commission did not include the Draper rights.

These arguments made by appellants are so plainly without merit, so contrary to the express provisions of statute as well as the Commission's uniform administrative practice, that they deserve

no serious consideration. Appellants' argument substantially comes to this: Falwell is operating; operation without a certificate is illegal; therefore, Falwell has a certificate. The unsoundness of such reasoning is obvious.

As to appellants' second point, it is equally clear that the Commission did not commit error when it recognized and applied the distinction between regular and irregular route service. In so doing the Commission was merely giving effect to a distinction long recognized in the motor carrier industry and specifically embodied in the Act itself as construed by the decisions of the Supreme Court.

Thus, in *United States* v. *Maher*, 307 U. S. 148, in upholding denial of a "grandfather" application where during the "grandfather" period the applicant had changed the nature of his operation from irregular to regular route service, the Court said:

> The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiating between operations over the "route or routes" for which an application under the "grandfather clause" is made as against operations "within the territory," Congress plainly adopted the familiar distinction between "anywhere-for-hire" bus operations over irregular routes and regular route bus operations between fixed termini. Such

> recognition is implicit also in the provision of § 208 (a) that "Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." Since the new regular route of appellee was not in existence on June 1, 1935, and the irregular "anywhere-for-hire" service was not "so operated," as required by § 206, when the Commission passed upon the application for a "grandfather" certificate, the Commission rightly rejected the application.

Similarly, in *United States* v. *Carolina Freight Carriers Corporation,* 315 U. S. 475, 480, after referring to the provisions of Sections 206 (a) and 208 (a) of the Act, the Court said:

> It is clear from these provisions that the power of the Commission to authorize future operations within a designated "territory," rather than over specified routes or between fixed termini, fits the peculiar requirements of irregular route operators such as appellee.

Contrary to what appellants assert in Assignment of Error (c), the Commission's order did not change or alter the kind of service which Draper was authorized by his "grandfather"

certificate to perform. On the contrary, the Commission's order preserved Draper's "grandfather" rights intact, and prevented the dislocation of the Roanoke-Lynchburg segment from the historical pattern of radial operation which was the basis of their being originally granted to Draper. The Commission's order in no wise impairs Draper's rights; it merely disapproves of the transfer of a single portion of them to Falwell, while Draper retains the rest. It is Falwell, and not the Commission, who sought to change the nature of the operations to be conducted under Draper's rights, by transforming such operations from irregular route radial service, as theretofore performed by Draper since prior to June 1, 1935, into a new species of service practically indistinguishable from the regular route service conducted over the Evans and Falwell rights.

As to appellants' final contention, that the Commission's order is contrary to the provisions of Section 5 of the Act, it is clear that this assertion is likewise without merit. In essence what appellants here contend is that the Commission was bound to presume that Falwell could and would respect, in its future operation, the restriction against regular route operation over the Draper rights. But such a presumption would have required the Commission to ignore the inescapable inferences from the clearly disclosed facts

regarding Falwell's past performance and unmistakable intentions for the future.

In another case, *Alton Railroad Company* v. *United States,* 315 U. S. 15, 21, the Court recognized that the Commission had been liberal in awarding extensive territory to irregular route carriers where the "characteristics of the transportation service involved" were such that substantial *bona fide* service could be shown without proof of actual instances of transportation.

In *Ex parte No. MC–10, Classification of Motor Carrier of Property,* 2 M. C. C. 703, 709, decided August 9, 1937, the Commission, pursuant to the authorization in Section 204 (c) of the Act with respect to classifications of carriers, adopted definitions distinguishing between regular and irregular route service.

In view of the foregoing authorities, it is clear that the Commission was entitled to take into consideration, in passing upon the effect of the proposed transaction upon the public interest, the long-recognized distinction between the two types of service. Consequently, in the light of the facts found by the Commission regarding Falwell's past mode of operation, the Commission was warranted in concluding that the transfer of Draper's rights to Falwell should not be approved.

The record made it plain that such transfer would result in a substantial change in the nature of the operations conducted under authority of

those rights. Draper's right to operate between Roanoke and Lynchburg was a part of a "radial" pattern of operation in which he was engaged on the "grandfather" date. Draper's operation viewed as a whole, therefore, as has been previously indicated, presents a pattern comparable to a wheel having numerous spokes. The right sought to be transferred to Falwell was thus merely one segment of an integrated entity, one of the spokes in the wheel; the Commission was warranted in concluding that it should not be separately assigned and transferred to another carrier.

It is submitted that in the light of the facts found by the Commission, and in the light of the extensive discretion which is conferred upon the Commission with respect to approval of transactions under Section 5, the Commission's decision disapproving the purchase of Draper's rights by Falwell is clearly justified and in accordance with applicable law.

The wide range of administrative discretion vested in the Commission by Section 5 is clearly manifested in the recent judicial decisions which have dealt with that section of the Act: *McLean Trucking Company* v. *United States,* 321 U. S. 67; *Schultz* v. *United States,* 59 F. Supp. 338 (W. D. Wisc., 1945); *General Transportation Company* v. *United States,* 65 F. Supp. 981 (D. Mass., 1945), aff'd October 14, 1946.

Moreover, the legislative history of Section 5 of the Interstate Commerce Act, as amended, shows the extent of the wide range of discretion given to the Commission in this type of case. Section 5 is a statutory prohibition upon mergers and other acquisitions of control of carriers, in the absence of permission from the Commission when it finds that the proposed transaction is consistent with the public interest.

In the original Act to Regulate Commerce passed in 1887, Section 5 was an outright prohibition of pooling of traffic and revenue.[7] This anti-pooling provision may be regarded as a precursor of the broader prohibitions contained in the Sherman Antitrust Act which became law three years later.[8]

These restraints were relaxed by the Transportation Act of 1920.[9] Section 5 was amended so as to permit pooling upon specific order of the Commission. Upon similar approval acquisitions under lease or by the purchase of stock or in any other manner not involving consolidation into a

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[7] 24 Stat. 379, 380.

[8] Sherman Act of July 2, 1890, 26 Stat. 209. In a textbook by William L. Snyder, *The Interstate Commerce Act and Federal Anti-Trust Laws* (1904), 121–22, the author points out that:

> The Sherman Act, with reference to the Commerce Act, is practically supplemental legislation. Its effect and operation is to broaden the provisions of Section 5 so as to embrace not only carriers, but manufacturers and producers as well.

[9] 41 Stat. 456, 480.

single system were made lawful. Consolidation was also permitted subject to certain conditions requiring that the proposed consolidation be in harmony with the general plan for railroad consolidations to be prepared by the Commission.

The Emergency Transportation Act of 1933 again amended Section 5.[10] The distinction between "acquisitions of control" and "consolidation into a single system" was eliminated, and a single procedure was established for dealing with the several methods of unification. A provision was added specifically prohibiting "control or management in a common interest" in whatever manner effected, except as provided in Section 5.[11]

When motor carriers were brought under regulation in 1935, Section 213 (a) of the Motor Carrier Act[12] provided a scheme of Commission control of unification which was patterned after Section 5.

The Transportation Act of 1940 amended Section 5 so as to make it applicable to rail, motor,

[10] 48 Stat. 211, 217.

[11] In the *Nickel Plate* case, 79 I. C. C. 581, the Commission had held (Commissioner Eastman dissenting), that its approval was not necessary, under Section 5 as amended by the Transportation Act of 1920, for a merger not violative of the antitrust laws, but that the consolidation might be effected under state law. *Snyder* v. *New York Central and St. Louis Railroad Company*, 99 *Ohio St.* 72, 85, aff'd 278 U. S. 578.

[12] 49 Stat. 543, 555.

and water carriers." At the same time the Commission's authority was broadened by the insertion of the words "or otherwise" after the provision relating to control "through ownership of stock." (See *United States* v. *Marshall Transport Co.*, 322 U. S. 31, 38–9).

These successive changes and amendments in the language of Section 5 indicate a clear and increasing intent on the part of Congress to prohibit all acquisitions by one carrier of the control, assets, or operating rights of another carrier without Commission approval. Congress intended that such transactions should be permitted only after careful scrutiny by a public agency, and after a determination by that agency that the proposed transaction will be consistent with the public interest.

Thus it must be remembered that Falwell has no legal right to purchase Draper's operating authority. The transaction is *prima facie* prohibited by statute; and becomes licit only when, as, and if it is specifically approved by the Commission. In the case at bar such approval by the Commission has not been granted, but has been withheld. Operating rights as a motor carrier are not assignable freely like a negotiable instrument but may be transferred to a new holder only when the administrative body having jurisdiction

[13] 54 Stat. 898, 905. Section 213 (a) of the Motor Carrier Act was accordingly repealed.

has concluded, after careful scrutiny, that the proposed transaction is warranted as being in accordance with the public interest.

It would require a strong showing to demonstrate that the Commission, an expert agency entrusted by Congress with the function of safeguarding "the public interest" in an adequate national transportation system, had, in disapproving the purchase by Falwell of a portion of Draper's operating authority, acted arbitrarily or in bad faith instead of conscientiously determining the issues presented in accordance with its understanding of the transportation situation and the public welfare. No such showing has been made here by appellants.

For the foregoing reasons, it is evident that this appeal presents no substantial questions. It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

George T. Washington,
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1091.

C. W. FALWELL, JR., and FALWELL FAST FREIGHT, INC.,
*Plaintiffs-Appellants,*

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Defendants-Appellees.*

## BRIEF AMICI CURIAE OF BRADY TRANSFER AND STORAGE COMPANY AND THE IRREGULAR ROUTE COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS IN REPLY TO THE MOTION TO AFFIRM.

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| Argument | 15 |
| A. There is no express or implied authority in the Motor Carrier Act (49 U. S. C. A. 300, et seq.) directing or authorizing the Interstate Commerce Commission to limit or specify the quantity or the quality of the service to be performed by motor carriers of property or by any type of motor carriers of property. | 15 |
| 1. Section 204(b) (49 U. S. C. A. 304(b)) of the Act, authorizing the classification of carriers, does not empower the Commission, and was not intended to empower the Commission, to limit the quantity or quality of the service of motor carriers nor the exercise by them of their statutory rights and duties | 15 |
| 2. There is no anywhere-for-hire motor carrier of property under the Act. Congress did not provide, nor intend to provide, a distinction between the business of regular-route carriers of property and the business of irregular-route carriers of property. Instead, Congress provided only two classes of for-hire property carriers, common and contract, with the same legal obligations and privileges. The dis- | |

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tinction between the operations of regular-route and irregular-route property carriers lies only in the geographic area and pattern of the operations and the commodities to be transported, together with any self-imposed special limitations related to those commodities 21

3. The authority of the Commission to consider the quality and quantity of the service of a "grandfather" applicant is limited to a determination of his status as common or contract and to the substantiality of his proof of the area served and the commodities transported. Thereafter, the carrier's legal status, as common or contract carrier, determines the quantity and quality of the service he may perform in the territory and for the commodities authorized. . . . . 26

4. That part of section 208(a) (49 U. S. C. A. 308(a)) which directs the Commission to specify in the certificate the "service to be rendered" does not authorize the Commission to limit the quantity and quality of the service to be rendered . . . . . 28

5. The legislative history of section 208(a) (49 U. S. C. A. 308(a)) of the Act discloses that the Commission requested explicit authority to limit the service of motor carriers, that the industry opposed the granting of such a power, and that in response to this opposition, the Congress not only removed the proposed authorization from the bill but also expressly prohibited the imposition of such limitations. The Commission is here attempting to raise by implication an authority which was expressly denied it by the Congress. . . . . 30

B. The Commission's use of the words "over irregular routes" in the certificate issued to Draper was intended as a description of the geographic pattern of his operation and was not intended as a limitation on the quantity and quality of the

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service authorized. Any attempt to enlarge the meaning of those words so as to incorporate such a limitation is an attempt to revoke statutory rights contrary to the letter and the policy of the Act and to destroy property rights without due process of law. ..... 36

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1091.

C. W. FALWELL, JR., and FALWELL FAST FREIGHT, INC., *Plaintiffs-Appellants,*

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Defendants-Appellees.*

## BRIEF AMICI CURIAE OF BRADY TRANSFER AND STORAGE COMPANY AND THE IRREGULAR ROUTE COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS IN REPLY TO THE MOTION TO AFFIRM.

### OPINION OF THE LOWER COURT.

The opinion of the United States District Court for the Western District of Virginia is reported in 60 F. Supp. 71.

### JURISDICTIONAL STATEMENT.

The jurisdiction of the Court arises under Sec. 228 of the Judicial Code, 28 U. S. C. A. 345. Appeal was allowed on February 1, 1947, appeal papers were served on February 11, 1947, and the original record was certified to this Court and received by the clerk on March 3, 1947.

This is a direct appeal from a final decree, dated December 21, 1946, of a specially constituted District Court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellants' complaint to set aside an order of the Interstate Commerce Commission, decided January 14, 1946, and reported at 40 M. C. C. 439.

The Commission's order was issued in a proceeding arising under Section 5 of the Interstate Commerce Act, as amended (49 U. S. C. A. 5). The order denied appellants' application to purchase a portion of the operating authority of W. B. Draper, concluding that the purchase would not be consistent with the public interest for reasons stated in the report.

A motion to affirm the decree of the lower court was filed by appellees on March 4, 1947, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States. This brief *amici curiae* is filed in reply to said motion, pursuant to agreement by all parties.

## QUESTIONS PRESENTED.

The instant case appears to involve two fundamental questions not heretofore passed upon by this Court:

1. Does the Commission have the power in granting certificates, or thereafter to limit the quantity and characteristics of service which a common carrier of property by motor vehicle may render, provided the service is conducted within the territorial and commodity limitations of the carrier's operation?

2. If the Commission does have such power, is it exercised by the use of the term "over irregular routes" in the grant of certificates so that a carrier with a certificate so phrased may not legally operate between his authorized termini, or within his authorized area, in a manner similar to that in which a carrier granted authority to operate over regular routes between the same points would operate?

These questions are raised by the Assignment of Error described in the Motion to Affirm (p. 4) as follows:

> "2. That the order made by the full Commission on January 14, 1946, upon reconsideration of the prior order of Division 4 is invalid because based on an erroneous conception of the kind of service that an irregular-route carrier may render."

## STATEMENT OF INTEREST IN THE PROCEEDING.

The Brady Transfer & Storage Company and the many hundred members of the Irregular Route Common Carrier Conference of the American Trucking Associations have a vital interest in the questions presented. They hold certificates authorizing operations "over irregular routes" and have built up transportation businesses which yield them revenues amounting to many millions of dollars annually from services over such routes. If the first question presented were to be answered in the negative, and the second in the affirmative as the lower court did answer them, their businesses would be destroyed.

That is exemplified by a recent decision of Division 5 of the Commission in a proceeding known as "*Transportation Activities of the Brady Transfer and Storage Company*, No. MC-C-246." That proceeding was instituted by the Commission on its own motion to determine whether certain of Brady's operations conducted pursuant to a certificate authorizing operations "over irregular routes" constituted unauthorized "regular-route scheduled interstate motor carrier transportation service." Brady is the respondent in that proceeding, and the Conference intervened in his behalf. In its decision, the Commission directed Brady to cease and desist from the performance of certain irregular-route operations within the territorial limits of the Brady certificate upon a finding that Brady conducted such operations in a manner similar to regular-route operations, and consequently illegally. In the Brady case, Division 5 held in essence that irregular-route carriers are not authorized to conduct a service which reflects the following character-

istics: a predetermined plan which amounts to a recurrent geographical pattern of operation; traffic consisting predominantly of aggregated less-than-truckload shipments received from many different shippers; intensive solicitation of such traffic; use of terminals and call stations at points other than the carrier's base; regular use of the same highways; regular operation between the same points; a known, generally accepted or held out periodicity of service whether daily or more or less frequent; schedules, that is, a pattern of departures and arrivals, particularly if advertised to shippers.

These criteria are stated to be incidents of regular-route service and not authorized for use by irregular route certificate holders. In essence, the views expressed by Division 5 are these: a carrier authorized to perform service over irregular routes must confine his business to a few shippers, shipping largely in truckloads or in large shipments rather than small ones; he must not hold himself out to the public generally or to perform any standard, recurrent pattern of service; he must not let his operation develop into scheduled service but must keep it sporadic and uncertain; he must limit the quantity and the quality of the transportation service he offers; he must serve certain selected shippers and refuse to serve the public generally.

In imposing these requirements in the Brady case, Division 5 proceeded upon the assumption that the questions above stated should be answered in the affirmative. In arriving at that conclusion, Division 5 relied upon the holding of the lower court in the instant case. If the theory of the Commission and the lower court in the instant case is sustained, the growth of operations over irregular routes will be retarded and every irregular-route operation of substantial size will be threatened with destruction.

## POINTS OF LAW RELIED UPON.

The points of law relied upon to sustain Assignment of Error No. 2 are as follows:

1. In determining whether a proposed transaction subject to the provisions of Sec. 5 of the Interstate Commerce Act (49 U. S. C. A. 5) is "consistent with the public interest", the Commission must make essential findings of fact to support its ultimate conclusion of law.

2. An order of the Interstate Commerce Commission concluding that a proposed transaction subject to the provisions of Sec. 5 of the Act (49 U. S. C. A. 5) would not be consistent with the public interest, which conclusion is supported only by findings of fact based upon an error of law, is erroneous.

3. It is error for the Commission to find that it has statutory authority to restrict the quantity or quality of the service which may be performed by a common carrier of property by motor vehicle, issued a certificate of public convenience and necessity pursuant to Sec. 206(a) (49 U. S. C. A. 306(a)) of the Act, within the territorial and commodity limits of such certificate.

4. It is an error for the Commission to find that in issuing a certificate of public convenience and necessity to a common carrier of property by motor vehicle pursuant to Sec. 206(a) (49 U. S. C. A. 306(a)) of the Act which authorized operations "over irregular routes" the recipient was thereby restricted from performing whatever quantity and quality of service his facilities and the needs of the public would permit within the territorial and commodity limitations in such certificate.

5. The Commission's finding that the quality and quantity of the service propose to be rendered by Falwell over the operating authority of Draper would constitute an unlawful use by Falwell of such authority is erroneous as a matter of law, and if the conclusion of the Commission

that the proposed transaction would not be consistent with the public interest is unsupported by other findings, the order is unsupported by essential findings of fact and should be set aside.

Brady and the Conference do not concern themselves with the other allegations of error made by appellants. Neither do they concern themselves with the ultimate issue of whether or not the order of the Commission be sustained, provided the affirmance is not (1) on the ground that the Commission *has power* to limit the services of a common carrier of property by motor vehicle authorized to operate over irregular routes to a service which is free from some, or all, the Brady case criteria; or (2) on the ground that the Commission *exercised such power* by simply using the words "over irregular routes" in a certificate, without any other words of limitation or qualification.

It may appear to the Court that the Commission's report in the instant case includes findings of fact other than the alleged prospective illegality of the proposed operation of the combined authorities, but since the lower court predicated its decision solely upon this ground, disposition of this case on motion to affirm would, if no opinion were rendered expressly reserving decision on this issue, substantially prejudice the position of Brady and the Conference in the complaint proceeding against Brady now pending before the full Commission in MC-C-246. This follows from the fact that Division 5 of the Commission, in its report in MC-C-246, relies strongly on the opinion of the lower court in the *Falwell* case as authority for its claim of power to restrict the service of carriers operating over irregular routes.

It is therefore imperative that Brady and the Conference, by demonstrating to the Court that a substantial and novel issue of law is present in this case, preserve this important issue for a decision on its merits in this or in another appropriate proceeding.

## THE REPORT OF THE COMMISSION.

The Draper certificate which was first leased by Falwell pursuant to the authority granted under Section 210a(b), and then purchased by Falwell pursuant to the authority granted by Division 4 in its report of February 22, 1945 (40 M. C. C. 127), authorized, *inter alia*, operations as a common carrier of general commodities between Roanoke and Lynchburg (fixed termini) over irregular routes. The report of the entire Commission of January 14, 1946 (40 M. C. C. 439), which reversed Division 4, pitched the conclusion that the purchase had not been shown to be consistent with the public interest upon a finding that Falwell, although operating within the geographical and commodity limitations of the Draper certificate, was and would conduct operations of a different "nature" than authorized by the Draper certificate, such different operations being like those of a regular-route carrier. The Commission did not view the services of different "nature" as opposed to the public interest merely by reason of the difference; rather, it concluded that Draper had no legal right under his certificate to render the kind, quality, and quantity of service which Falwell, as lessee and purchaser, rendered between the authorized termini; that the rendition by Falwell of a frequent and substantial service, instead of a "sporadic" service, was the same kind of service as would be rendered under a certificate authorizing operations over regular routes; that the rendition of said service was and would be illegal since beyond the authority originally granted to Draper; and that because of that circumstance the purchase had not been shown to be consistent with the public interest.

This reflects an assumption by the Commission of a power and the exercise of said power which Brady and the Conference dispute.

## HOLDING OF THE LOWER COURT.

The lower court stated in its opinion, at page 75, that the Commission's decision:

> "... was based on a finding which was in substance that during the period of their lease and thereafter the plaintiffs had been utilizing those rights for the conduct of regular-route operations between Lynchburg and Roanoke; that the plaintiffs intended to use the Draper rights in this manner and for this purpose and that they would not and could not be used in any other way; that if the Draper rights were unified with the already existing regular route operating rights of plaintiff out of Lynchburg, it would be impossible for plaintiffs to operate irregular-route operations between Lynchburg and Roanoke *of the nature contemplated in the original grant to Draper.*" (Emphasis supplied.)

*Falwell et al.* v. *United States et al.*, 69 F. Supp. 71, 75.

The Court apparently found no other reasons for the denial than the alleged illegal conversion and it adopted the Commission's view on this issue. The Court stated the issue to be whether the Commission can predicate a denial of a purchase application on the ground that irregular route operating rights cannot lawfully be used to perform a service which has the service characteristics of a regular route in character. The Court said, page 77:

> "The argument, as we understand it, amounts in the end to this: That a certificate for irregular-route operations over a specified territory carries no restrictions as to *the highways* (or routes) over which the carrier may operate within the territory or between the points specified in his certificate; and that the carrier is likewise under no prescription or restriction as to *schedules of service or quantity or quality of service.* And that, therefore, the holder of a certificate for irregular-route operations may, if he choose, utilize his rights or any part thereof to establish regularly scheduled operations over any highway within his territory—or in other words, to conduct his operations in

> the form of regular-route operations between any points covered by his certificate. And this, even if by so doing he parallels the service rendered by any number of other carriers holding regular-route certificate for operations between the same points. (Emphasis supplied).

The Court stated its disagreement with this proposition, assumed the existence of an undefined "distinction between regular route and irregular-route carriers", and looked to Section 204(b) of the Act, 49 U. S. C. A. 304(b) to find the statutory authority for such a distinction and the manner in which the Commission attempts to define it. As support for its views the Court said, page 77:

> "That the Commission has authority to make the above classifications and that they are proper distinctions in classes of service which will be recognized has been well settled by the decisions of the courts. See *United States* v. *Maher*, 307 U. S. 148, 59 S. Ct. 768, 83 L. Ed. 1162; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971.

This holding of the Court puts squarely in issue the following propositions of law: (1) Whether the Commission, in issuing grandfather certificates, had statutory authority to restrict them as to the quantity and quality of the service which could be performed by a common carrier of property by motor vehicle other than in respect of the territory to be served, the commodities to be transported, and the kind of equipment to be used where the applicant had voluntarily restricted his holding out to specialized equipment; (2) Whether the Commission had statutory authority to differentiate between types of common carriers of property by motor vehicle so as to require that such carriers "over irregular routes" must perform a different character and a smaller volume of service than carriers over "regular routes"; (3) Whether, assuming *arguendo*, that the Commission did have such authority, its use of the words "irregular routes" in the Draper certifi-

cate was intended to limit and did limit the character and quantity of the service which Draper could provide to that character and quantity which provided the basis for the confirmation of his "grandfather" rights.

The authorities cited by the Lower court do not support its proposition that the Commission did have such authority and did exercise it so as to render illegal the operation of the Draper certificate in the manner used by Falwell.

## STATUTES INVOLVED.

The authority of the Commission to restrict the character and quantity of a motor carrier's service must be found in the Motor Carrier Act. (49 U. S. C. A. 300, *et seq.*) There is no express grant of such authority. The lower court was satisfied to look solely to Section 204(b) of the Act (49 U. S. C. A. 304(b)) and to two decisions of this Court, one of which refers to Section 208(a) of the Act (49 U. S. C. A. 308(a)), to find such authority.

Section 204(b) of the Act (49 U. S. C. A. 304(b)) provides:

> The Commission may *from time to time* establish such just and reasonable classifications of brokers or of groups of carriers included in the term "common carrier by motor vehicle", or "contract carrier by motor vehicle", as the special nature of the services performed by such carriers or brokers shall require; and such just and reasonable rules, regulations, and requirements, *consistent with the provisions of this part,* to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest. (Emphasis supplied).

It is clear from the language used in this provision that use of the authority thereby granted must be consistent with the grants of authority to the Commission and limitations upon those grants provided in the other provisions of the Motor Carrier Act. The authority of the Commission to grant, withhold or limit the operating authority of

carriers operating in interstate commerce on June 1, 1935 must be found in the certificate provisions of the Act, Sections 206(a), 207(a) and 208(a). The material provisions of Section 206 (49 U. S. C. A. 306(a)) are:

> (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations; *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time * * *, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, * * *.

The material provisions of Section 207(a) (49 U.S.C.A. 307(a)) are as follows:

> (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such applications shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

The material provisions of section 208(a) (49 U.S.C.A. 308(a)) which bears the title, "Terms and Conditions of Certificate" are as follows:

> (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6); *Provided, however,* That no terms, conditions or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

Section 210, referred to, prohibits dual operation of common and contract carrier authorities except upon special findings; Section 204(a)(1) and (6) make it the duty of the Commission:

> (1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

and,

(2) To administer, execute and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration.

## SUMMARY OF THE ARGUMENT.

A. There is no express or implied authority in the Motor Carrier Act (49 U.S.C.A. 300, et seq.) directing or authorizing the Interstate Commerce Commission to limit or specify the quantity or the quality of the service to be performed by motor carriers of property or by any type of motor carriers of property.

1. Section 204(b) (49 U.S.C.A. 304(b)) of the Act, authorizing the classification of carriers, does not empower the Commission, and was not intended to empower the Commission, to limit the quantity or quality of the service of motor carriers nor the exercise by them of their statutory rights and duties.

2. There is no any-where-for-hire motor carrier of property under the Act. Congress did not provide, nor intend to provide, a distinction between the business of regular-route carriers of property and the business of irregular-route carriers of property. Instead, Congress provided only two classes of for-hire property carriers, common and contract, with the same legal obligations and privileges. The distinction between the operations of regular-route and irregular-route property carriers lies only in the geographic area and pattern of the operations and the commodities to be transported, together with any self-imposed special limitations related to those commodities.

3. The authority of the Commission to consider the quality and quantity of the service of a "grandfather" applicant is limited to a determination of his status as common or contract and to the substantiality of his proof of the area served and the commodities transported. Thereafter,

the carrier's legal status, as common or contract carrier, determines the quantity and quality of the service he may perform in the territory and for the commodities authorized.

4. That part of section 208(a) (49 U.S.C.A. 308(a)) which directs the Commission to specify in the certificate the "service to be rendered" does not authorize the Commission to limit the quantity and quality of the service to be rendered.

5. The legislative history of section 208(a) (49 U.S.C.A. 308(a)) of the Act discloses that the Commission requested explicit authority to limit the service of motor carriers, that the industry opposed the granting of such a power, and that in response to this opposition, the Congress not only removed the proposed authorization from the bill but also expressly prohibited the imposition of such limitations. The Commission is here attempting to raise by implication an authority which was expressly denied it by the Congress.

B. The Commission's use of the words "over irregular routes" in the certificate issued to Draper was intended as a description of the geographic pattern of his operation and was not intended as a limitation on the quantity and quality of the service authorized. Any attempt to enlarge the meaning of those words so as to incorporate such a limitation is an attempt to revoke statutory rights contrary to the letter and the policy of the Act and to destroy property rights without due process of law.

## ARGUMENT.

**A. There is no express or implied authority in the Motor Carrier Act (49 U. S. C. A. 300, et seq.) directing or authorizing the Interstate Commerce Commission to limit or specify the quantity or the quality of the service to be performed by motor carriers of property or by any type of motor carriers of property.**

**1. Section 204(b) (49 U. S. C. A. 304(b)) of the Act, authorizing the classification of carriers, does not empower the Commission, and was not intended to empower the Commission, to limit the quantity or quality of the service of motor carriers nor the exercise by them of their statutory rights and duties.**

The lower court placed principal emphasis for its upholding of the Commission's authority to limit the service of carriers using "irregular routes" on the Commission's power to classify carriers, Sec. 204(b) (49 U.S.C.A. 304(b)) of the Act, and upon the exercise of that power by the Commission in *Ex Parte No. MC-10, Classification of Motor Carriers of Property*, 2 M.C.C. 703. Reference to that decision, and to the terms and legislative history of that statutory provision, shows that they do not support this proposition. Reference to the decisions of this Court construing various of the powers and duties of the Commission under the Motor Carrier Act shows that none of them have considered or decided the issues raised herein.

In *Classification of Motor Carriers of Property, supra*, the Commission undertook to group the many different types of motor carriers into a system of defined classes. The Commission had two purposes in mind. One was to provide a convenient way of including or excluding various specialized types of carriers from the rules and regulations concerning matters such as safety, accounts, reports and hours of service. The other was to "facilitate the identification and description of the operations to be covered" in connection with the issuance of certificates (703, 704).

Beyond specifying the geographical pattern of the operations and the commodities to be carried (which in some cases necessitated consideration of the equipment to be used) the Commission did not intend nor believe it had the authority to go on classifying carriers. The report says, at page 705:

> We do not believe, however, that it is now desirable, or in accordance with the intent of section 202, to define strictly each type or kind of carrier or broker. Our basic purpose has been to ascertain and define generally the natural divisions which are now present in the industry. In so doing, we have refrained from attaching to any group rules or regulations applying to the transportation activities of the group. The necessity for rules and regulations, special or otherwise, will be brought to our attention through future experience, and will be dealt with in separate proceedings.

The Commission tacitly admitted that its power to classify carriers does not include the power to make "grandfather" carriers conform to administratively-determined grouping. The report states, at pages 703, 704:

> • • • The problem of classification is made difficult, however, by the fact that a very large proportion of the operators who are subject to the act now have "grandfather" rights. It is not always easy to fit such operators into a definite classification.

The Commission carefully avoided including in its definitions of the carrier groupings any limitations on the *character of the service* and the *quantity of the service* which carriers in any particular class or group might provide, beyond the specification of the geographical pattern of the operation. It was stated, at page 704:

> • • • We are impressed, too, with the fact that a practical classification must not only provide a satisfactory operating sphere for each kind and major type of operator now in existence, but it must also avoid the danger of establishing restrictions which might be burdensome

> to the industry. The public interest requires that the way be left open for normal healthy growth. Any plan which would retard such growth would defeat the purpose of the act. We have been fully cognizant of these facts throughout the course of our study of this matter.

The report recognized that the Act provides for only three types of motor carriers, common, contract and private. It established five "Types of Property-Carrier Service": regular-route scheduled service; regular-route nonscheduled service; irregular-route radial service; irregular-route nonradial service; and local cartage service. Each type was defined geographically and none of the definitions include any limitations on the *character and quantity of the service* any of them may perform.

The Draper certificate was apparently one that the Commission had in mind when it said in the *Classification* case, *supra,* that because of the existence of "grandfather" rights, all certificates could not be fitted into the pattern established in that case. None of the five "classes of service" fit Draper's certificate. It has been said that the Draper operation is a "radial" operation. The Commission defined "irregular-route radial service" as follows, page 709:

> An irregular-route radial-service carrier is any person who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation over irregular routes from a fixed base point or points to points or places located within such *radial area* as shall have been fixed and authorized by the Interstate Commerce Commission *in a certificate* of public convenience and necessity, *or permit,* or from any point located within such radial area to such carrier's fixed base point or points. (Emphasis supplied).

Draper has a fixed base point, Roanoke, Va., but he has no radial area. He has a series of fixed points each of which may be served on traffic moving to or from Roanoke. He operates between "fixed termini" not "within the terri-

tory", specified pursuant to section 208(a) of the Act (49 U.S.C.A. 308(a)).

It may be noted that the *Classification* case, *supra*, covers contract carriers of property as well as common carriers of property, and that the definition above-quoted refers to permits as well as to certificates. This fact negatives any interpretation which attempts to establish that these classifications were intended to define *service characteristics*. It cannot be said that this definition describes *the service* to be performed by both common carriers and contract carriers in view of the legal distinction between the two.

The legislative history of section 204(b) of the Act (49 U.S.C.A. 304(b)) establishes that it cannot be so construed as to permit its use by the Commission to limit the rights granted to "grandfather" carriers under the certificate provisions of the Act. It shows rather that it was designed as a purely administrative measure to permit the Commission to exempt from rules and regulations of general application certain special types of carriers.

This section did not appear in the Rayburn Bill (H. R. 6836), nor in the first draft of the Eastman Bill (S. 3171). It was added in the second draft (S. 1629 and H. R. 5262) by the Federal Coordinator of Transportation, Mr. Eastman, in his third report with the following explanation, at page 60, House Doc. 89, 74th Cong.:

> The provision empowering the Commission to classify common or contract carriers, respectively, into distinctive groups according to the special nature of their services, and to provide regulations for such classes or groups which are appropriate to their operations and consistent with the public interest, is of special significance in the case of motor carrier operations. This provision, coupled with others that give the Commission broad measures of administrative discretion has in view of the fact that the motor carrier industry embraces many specialized types of carriers whose operations are not conformable to a single pattern of regulation and the need in the public interest, of a form and degree of regulation sufficiently flexible

to assure the proper development of motor transportation. This provision for classification or grouping of motor carriers has a particularly important relation to the regulation of contract carriers. (House Document 89, 74th Cong., 1st Sess., Page 60).

During the Hearings Before the House Subcommittee on Interstate and Foreign Commerce on H. R. 5262, Mr. Eastman had this to say about the classification section, at pages 28, 29:

> So far as the regulation of these private and contract carriers is concerned, it seems to me that the important principle which should govern and which justifies any such regulation is the need for protecting the common carrier who undertakes to serve all the public. The common carrier is the one, it seems to me, that the Government ought, particularly to foster and protect. Now the contract carrier or private carrier can operate in such a way as to be detrimental, unfairly or improperly, to the interests of the common carrier. To the extent that such conditions exist, the Government is justified in interfering for the sake of protecting the common carrier; and it is on that principle that the regulation of the contract carrier in this bill very largely rests.
>
> In the bill, H. R. 5262, in its present form, certain changes have been made in comparison with the bill which was recommended last year, and some of these changes affect these contract carriers.
>
> Provision is made for the classification of motor carriers. This is in paragraph (b) of section 304:
>
> > The Commission may from time to time establish such just and reasonable classifications or groups of carriers included in the term "common carrier by motor vehicle", or "contract carrier by motor vehicle", as the special nature of the services performed by such carriers require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this part, to be observed by the carriers so classified or grouped, as the Commission deems necessary or desirable in the public interest.

> You will note in going through the bill that there are various provisions which leave discretion to the Commission, such as the provision with respect to accounting, and other provisions of similar character. In the case of the provision with respect to the filing of rates, charges or contracts by the contract carriers, the Commission is given specific discretion to relieve carriers from those regulations if it appears that no public interest will be contravened by such relief. In other words, the idea is that these contract carriers shall be regulated only to the extent that there is a real public need for their regulation, and if it appears, in the case of any group or any class of these carriers, that such need does not exist with respect to any of these discretionary provisions, then they can be relieved from them under the terms of the bill. The authority to classify the carriers will facilitate this.

In explaining the meaning of the classification section to the members of the Senate, Senator Wheeler, Chairman of the Senate Committee of Interstate and Foreign Commerce, made the following statement, at 79 Cong. Rec. 5652:

> This paragraph is of great importance. It enables the Commission to classify carriers performing special and distinct types of service, such as the hauling of milk, livestock, furniture, petroleum products, newspapers, and so forth, and to vary the regulatory requirements as to rates, records, reports, and other matters in accordance with the nature of the service and the public need. These provisions will promote flexible administration and enable the Commission to avoid imposing unnecessary burdens. It is to the interest of carriers, shippers, and the public that this paragraph be retained.
>
> I think that is an exceedingly important paragraph, because of the fact the Commission may find, for instance, that persons who are engaged simply in hauling furniture need one kind of regulations or rules that may be prescribed. Another classification may be those who are engaged in hauling oil or gasoline and a certain type of regulations may be necessary for them. This paragraph gives to the Commission the power to handle those matters.

It is apparent, therefore, that the Commission's power to classify motor carriers does not and was not intended to empower the Commission to so classify them as to limit the quantity and character of their services.

**2. There is no any where-for-hire motor carrier of property under the Act. Congress did not provide, nor intend to provide, a distinction between the business of regular-route carriers of property and the business of irregular-route carriers of property. Instead, Congress provided only two classes of for-hire property carriers, common and contract, with the same legal obligations and privileges. The distinction between the operations of regular-route and irregular-route property carriers lies only in the geographic area and pattern of the operations and the commodities to be transported, together with any self-imposed special limitations related to those commodities.**

*United States et al.* v. *Maher*, 307 U. S. 148 (1942), relied upon by the lower court to support its holding that the Commission does have power to limit the service characteristics of carriers "over irregular routes", is not in point. That case, which involved the "grandfather" application of a passenger carrier, is distinguishable by reason of the difference in the statutory requirements for the certification of passenger carriers as distinguished from property carriers and the legal distinction between any where-for-hire passenger carriage and irregular-route property carriage.

In the *Maher case, supra*, the issue presented was whether a passenger carrier had interrupted the continuity of his operation so as to exclude himself from the "grandfather" provision of the Act where on June 1, 1935, he conducted an "anywhere-for-hire operation in Oregon with occasional trips to points in Washington" but after that date and before the determination of his "grandfather" rights he discontinued that operation and instituted a regular route standard passenger operation between Portland, Oregon, and Seattle, Washington.

This Court held that since a *new operation* was instituted after the effective date and the other had been discontinued, the applicant was entitled to no "grandfather" rights.

This involved consideration of whether he had changed the territory in which he operated, so as to destroy the continuity, and whether the any-where-for-hire bus operation, essentially a special or charter operation, constituted a different business than regular-route passenger operation —as different, for example, as the difference between common and contract carriage in the property carrier field.

This Court found that in addition to the change in territory, which might alone have sufficed to break the continuity, there is a "distinction between 'anywhere-for-hire bus operations over irregular routes and regular route bus operations between fixed termini' " which, it was held, Congress had plainly adopted. The Court's holding in the *Maher* case, *supra,* however, cannot be considered determinative of the issues of this case wherein a common carrier *of property* by motor vehicle between fixed termini is involved, in view of the distinction between the two drawn by Congress.

Section 207(a) (49 U. S. C. A. 307 (a)) recognizes a sharp differentiation between property and passenger carriers in the manner in which the Commission was to administer the certificate provisions of the Act. This section provides that the Commission shall authorize no irregular-route passenger operations other than those having the characteristics of individual contracts—that is, special or charter operations. No such policy was enunciated in the property carrier field in which a special class of "contract carriers" was established. This class has its counterpart in "special or charter" passenger carrier operations.

Reference to the legislative history of this section (49 U. S. C. A. 307 (a)) shows that Congress clearly intended to differentiate between property and passenger carriers in this respect. In his third report to the Congress, the Federal Coordinator of Transportation, Mr. Eastman, gave

this explanation for the addition of the proviso in section 207(a) (49 U. S. C. A. 307(a)) specifically prohibiting the issuance of irregular-route certificates to passenger carriers, page 62:

> In section 307 a proviso has been added to prohibit the issuance of a certificate to common carriers of passengers for operations over other than regular routes and between fixed termini, except in the case of special or charter operations. The bus industry differs from the truck industry in that there is no substantial need for operation over irregular routes. The prohibition which has been added is a necessary measure of protection for regular route operators • • •

It must be recognized that at the time of the passage of the Motor Carrier Act and thereafter, there was a marked difference between passenger and property carrier operations. The special or charter passenger operation is closely akin to the contract carrier operation in the property carrier field. Each contemplates the devotion of the exclusive use of the equipment to a single individual or small group of individuals on an individual contract basis. In 1935, the bulk of passenger operations were clearly common carrier operations, falling into a regular-route pattern. Property carrier operations, on the other hand, were diverse, ranging from private to common. Many were described as "common-contract" carriers, in that their operations included elements of both types.

The American Trucking Associations' analysis of N.R.A. Code registrations presented to Congress on behalf of the entire trucking industry during House Committee Hearings on H. R. 5262 and H. R. 6016 (74th Cong., 1st Sess.) at pages 157-183 and Senate Committee Hearings on S. 1629 (74th Cong., 1st Sess.) pages 305-338 classified for-hire carriers as (1) common carriers; (2) commodity carriers; (3) contract carriers; (4) anywhere-for-hire carriers; (5) local cartage carriers; and (6) mixed types. A typical 5-state analysis of all types showed that 80.31 percent owned only

one truck and 90.62 percent owned no more than two trucks. The number of carriers in each class and the percentage of each class owning no more than two trucks were:

| | | |
|---|---|---|
| Common Carriers | 10,419 | 90.69 |
| Commodity Carriers | 547 | 93.54 |
| Contract Carriers | 6,530 | 89.38 |
| Anywhere-for-hire Carriers | 15,008 | 95.81 |
| Local Cartage | 7,864 | 92.72 |
| Mixed Types | 3,011 | 71.77 |
| Total | 43,379 | 90.62 |

This and other early proposals for regulation of the motor carrier industry advocated establishment of two classes of common carriers—regular-route and any-where-for-hire—in addition to contract carriers. Senate Doc. No. 43, 72d Cong., 1st Sess., page 115. After considering such proposed classifications, and the recommendations of the Commission and the Federal Coordinator of Transportation, Congress decided against sub-classifications of common carriers and provided for only two classes of for-hire carriers—common and contract. *Coordination of Motor Transportation,* 182 I. C. C. 263, 386; *Hearings Before the House Committee on H. R. 6836* (73d Cong., 2nd Sess.) p. 16; Sec. 203 (49 U. S. C. A. 303).

In the property-carrier field, the so-called any-where-for-hire and commodity carriers lost their places in the industry. They became common carriers or contract carriers. Their geographic area or points of service and their authorized commodities were specified. They were compelled to assume the full obligations, and the privileges, of common carriage, or they were forced to restrict their operations to those properly a part of contract carriage. In the passenger-carrier field, independent any-where-for-hire operations or irregular-route operations were eliminated. They became *regular route* common carriers or carriers of contract-carrier type—special or charter carriers.

So it may readily be understood that Maher's change from what amounted to a contract carrier operation to a common carrier operation constituted a change in his business which broke the continuity of his proof of "grandfather" rights. If he had obtained a certificate authorizing the charter or special operation which he was conducting before the "grandfather" date, and had thereafter begun regular route operations between two of the points named in his certificate, he would clearly have been operating unlawfully. In other words, a grandfather certificate containing the terms required by the statute to permit Maher to continue the operations conducted by him on the critical date, would not permit him legally to conduct the operations which he instituted after the critical date. This is made crystal clear by the provisions in Section 207(a) quoted above, and particularly the carefully chosen words in the proviso thereof.

In the case of a common carrier of property, no similar language governs the power of the Commission or the rights of the carrier as to the nature of the operation which may be conducted within the territorial limits of his certificate. The Draper certificate will illustrate this since he was authorized to operate as a common carrier of property generally over irregular routes between fixed termini. A carrier of passengers over irregular routes cannot have fixed termini, nor can he engage in any operation other than "special or charter operations." No such limitation is imposed by the statute on common carriers of property over irregular routes. Such common carriers of property are treated by the statute as having the same legal character and the same rights as to quality, quantity, and characteristics of the service as any other common carrier of property. Once the property carrier's legal status, common or contract, was determined, and his territory or fixed-termini and his commodities, were fixed, he had all the rights and duties of any common carrier including the duty to serve the public indiscriminately and to the full extent of his facilities as required.

In analogy to the *Maher* case, *supra,* the situation before this Court is this. Should Draper have changed his service between Lynchburg and Roanoke sometime after June 1, 1935, and before his rights were determined, to the character of service which Falwell provided over those rights—that is, a nonscheduled but frequent service over the same highway, of volume traffic, handled on interchange, moving to and from points beyond his termini—would he have so changed his operation as to destroy its continuity and lose his "grandfather" rights? We submit, that such would not be the case. He would have been handling the same commodities between the same points—he would simply have been providing more service of the kind which he held himself out to perform.

This view of the law has been expressly recognized by the Commission in granting certificates to common carriers of property *between fixed termini* over irregular routes. See *Southern United Lines, Inc.* case, 42 M.C.C. 251, reversing 24 M.C.C. 241. That case involved, as to a carrier of property, almost identically the same situation as was involved in the *Maher* case, as to a carrier of passengers. In its first report, Division 5 denied the certificate on the ground that the applicants after the critical date changed from an irregular-route territorial service to a service performed as an ordinary common carrier over a regular route between fixed termini. In the second report, Division 5 granted the certificate on the ground that the operations between the fixed termini were *within the territory served* on the critical date, and, therefore, met the requirements of Section 206(a) as to a carrier of property. Implicit in this holding is the recognition that the operations and "businesses" of regular-route and irregular-route property carriers are the same.

**3. The authority of the Commission to consider the quality and quantity of the service of a "grandfather" applicant is limited to a determination of his status as common or contract and to the substantiality of his proof of the area**

**served and the commodities transported. Thereafter, the carrier's legal status, as common or contract carrier, determines the quantity and quality of the service he may perform in the territory and for the commodities authorized.**

In *N. S. Craig, Contract Carrier Application*, 31 M. C. C. 705 (1941) the Commission, in its leading case on the distinction between common and contract carriage, had this to say, pp. 707, 708:

> It was pointed out that while the statute clearly contemplated that all for-hire motor carriers should be divided into only two classes, the line of demarcation between the two was indistinct, and that the two classes graded into each other so gradually as to make the proper classification of some particular carriers very difficult. At one extreme there was visualized those carriers serving all shippers indiscriminately under substantially identical arrangements, and, at the other, those who under individual contracts rendered only a specialized service meeting the peculiar needs of a particular shipper. The classification of the constituents of these extreme groups, of course, was no problem. The former were clearly common carriers and the latter contract carriers. In between these two extremes, however, the division recognized a confused assemblage of carriers, each of whom, to a greater or lesser degree, possessed some attributes of each of the extremes, and concluded that since the act, with exceptions not here important, contemplates the regulation of all for-hire motor carriers as either common or contract carriers, each such carrier of uncertain status must be classified according to the extreme which it most closely resembles. * * * With these conclusions we agree. * * * The courts have recognized contract carriage as a form of private carriage. * * * Both in its original conception and consistently since, the essential attribute distinguishing common carriage from private (contract) carriage has been the presence, or lack, of an offer or holding-out to serve the public generally. * * *

The Commission points out, page 709, that in determining whether a given carrier's holding out was that of a

common or contract carrier, "weight has been given to such secondary considerations as the number of contracts held, the frequency of their change, the commodities transported, the character of the physical operations performed, the use or not of regular routes, the giving or not of scheduled service, the observance or not of uniform charges;". The tests used to distinguish between common and contract (private) carriers appear strikingly similar to those used by Division 5 in the *Brady* case, *supra*, to force a distinction between regular-route and irregular-route common carriers.

It is conceded that the Commission, in a "grandfather" case, could properly examine the service characteristics of the applicant's operations in order to determine, first, whether the operations he conducted with such substantiality as to constitute bona fide holding out constituted him a common carrier or a contract carrier; and, second, what geographic and commodity authority were measured out by such substantially proved bona fide holding out. But once the character of the operation, common or contract, was established, and the determination made as to his bona fide holding out in terms of the territory to be served and the commodities transported, consideration of these service characteristics was at an end. This necessarily follows from the fact that the Commission's function, in considering the evidence of his operation, was to determine the extent of his bona fide holding out. Once that determination has been made, the carrier's holding out—as common or contract—determined both the obligations and the privileges which are attached to those classes of carriers.

**4. That part of section 208(a) of the Act (49 U. S. C. A. 308(a)) which directs the Commission to specify in the certificate the "service to be rendered" does not authorize the Commission to limit the quantity and quality of the service to be rendered.**

Any authority which the Commission may have to specify service features, such as the *Brady* case criteria, must be

found in that part of section 208(a) of the Act (49 U. S. C. A. 308(a)) which directs the Commission to specify in certificates "the service to be rendered." It was early recognized that the word "service" referred to the geographical pattern, such as radial or non-radial, the commodities to be carried and those excluded, and the character of the equipment to be used where the applicant had restricted his holding-out to specialized equipment.

The relation of the commodities to the equipment used make both necessary ingredients of the definition of the service to be rendered. Thus, in *Crescent Express Lines* v. *U. S.*, 320 U. S. 401 (1943), this Court held that the use of small vehicles to transport passengers constitutes a different business, because of the nature of that service, than the business of standard passenger lines. In the passenger carrier field, in which but one "commodity" is transported, the nature of the travel involved provides the distinction which is provided in the property carrier field by distinctions in commodity authorizations.

In *U. S.* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, the issue was presented whether the Commission could require a stricter test of proof of commodities transported and points served for irregular route than for regular route carriers. The Court stated, at page 483:

> By sect. 208(a) the certificate must specify "the service to be rendered" by the carrier. As we have noted, a "common carrier by motor vehicle" was defined in sect. 203(a) (14) as one who "undertakes" to transport "passengers or property, or any class or classes of property, for the general public". That definition is the same for irregular and regular route carriers.

At page 485, the Court said:

> • • • The difference between those types of carriers may well justify a sharp delimitation of the far flung territory which an irregular- route carrier may profess to serve. But once the territory has been defined, the statutory test of whether an applicant was a "common

> carrier" by motor vehicle in "bona fide operation" during the critical periods is the same for the irregular and the regular route carrier. • • •

Again, at page 486, it was stated:

> • • • For facts sufficient to establish that a person is a "common carrier" by motor vehicle in "bona fide operation" in the one case are sufficient in the other. The statutory differences lie only in the territorial scope and pattern of the operation.

In *Crescent Express Lines, Inc.* v. *United States, et al., supra,* this court cited with approval a decision of the Commission in which the Commission admitted its lack of authority to limit the service of motor carriers. *Irving Nudelman Common Carrier Application,* 28 M. C. C. 91, 95, 96; citing *Pittsburgh-Weirton Bus. Co. Inc. Com. Car. Application,* 10 M. C. C. 266. In the latter case, the issue was whether a carrier had instituted a *new operation* by increasing its service between two points from one round-trip a day to 250 one-way trips a day. The Commission held it had not instituted a new operation and referred to the proviso of Section 208(a) (49 U. S. C. A. 308(a)), saying at page 270:

> This prohibition protects the right of the carrier to expand not only its "equipment" but also its "facilities". The only purpose of such expansion is to enable the carrier to provide more service, and this is very clearly indicated by the words "as the development of the business and the demands of the public shall require." It follows that "terms, conditions, or limitations" in the certificate restricting *the service* of the carrier would be wholly inconsistent with this proviso.

**5. The legislative history of section 208(a) (49 U. S. C. A. 308(a)) of the Act discloses that the Commission requested explicit authority to limit the service of motor carriers, that the industry opposed the granting of such a power, and that in response to this opposition, Congress not only**

**removed the proposed authorization from the bill but also expressly prohibited the imposition of such limitations. The Commission is here attempting to raise by implication an authorty which was expressly denied it by the Congress.**

The legislative history of section 208, viewed in light of the legislative history of the Motor Carrier Act as a whole and particularly of the certificate sections of the Act, establishes that the power given the Commission to specify the service to be rendered was not to be construed as authority to limit the incidents of service as the Commission has attempted to limit them in the *Brady* case, *supra*, and the *Falwell* case, *supra*.

Section 208(a) of the Act appeared in four different forms in the course of its legislative history. It was present in the Rayburn Bill (H. R. 6836), in the first draft of the Eastman Bill (S. 3171), in the second draft of the Eastman Bill (S. 1629 and H. R. 5262), and in the Motor Carrier Act. The section underwent considerable change following the public hearings on these bills. These changes, and the expressed reasons for them, clearly show that the section was intended to provide no authority for reducing in any way the rights guaranteed by section 206(a) and the sections of the Act declaratory of the common law concept of common carriage.

In the Rayburn Bill, the Commission was authorized to attach to the exercise of the privileges granted:

> "* * * such reasonable terms and conditions as the public convenience and necessity may from time to time require, including terms and conditions as to the furnishing of additional service over the specified routes, between the specified termini, or within the specified territory * * *."

There was no proviso. It will be noted that while the Commission, under this provision, could specify "terms, and conditions", the word "limitations" was omitted. It will be noted further, that this draft would have given the Com-

mission explicit authority to *regulate the furnishing of additional service* but not expressly to *limit* it.

The first draft of the Eastman Bill did not change the language of this section in any important particular. No action was taken on this bill and the following year the second draft was submitted as S. 1629 and H. R. 5262 in the third report of the Federal Coordinator (House Document No. 89; 74th Cong., 1st Sess.). In it, section 208(a) was made applicable to certificates issued under section 206(a), the "grandfather" section, as well as to section 207, and one additional important change was made.

It is provided that the Commission was authorized to attach to the exercise of the privileges granted:

> "* * * such reasonable terms, conditions, *and limitations* as the public convenience and necessity may from time to time require, including terms, conditions *and limitations* as to the furnishing of additional service over the specified routes, between the specified termini, or within the specified territory * * *".

The addition of the words "and limitations", added by the Coordinator, was plainly designed to extend the Commission's jurisdiction to the point at which it could *limit the furnishing of additional service.*

Extensive hearings were held before both houses of Congress on this bill, and section 208(a) was the target of considerable criticism by members of the industry who were afraid to trust to an administrative agency the control of the growth of their businesses, through its power to limit any additional service which they might offer. There are many pages of such testimony in the records of the hearings. As a result this section was amended by the Senate Committee in important particulars. The Commission's authority to impose terms, conditions or limitations as to *"the furnishing of additional service over the specified routes, between the specified termini, or within the specified territory"* was eliminated. To make doubly sure that the Congressional mandate should not be misunderstood,

the proviso to the section was added prohibiting limitations as to the furnishing of additional "equipment and facilities". The proviso protects both regular route and irregular route carriers.

This should make it perfectly clear that the Commission was to have no power to limit or restrict the service which a carrier might offer. It shows further that the words "equipment and facilities" were used with the same intent and meaning as "additional service."

The explanation of these changes on the floor of the Senate, made by Senator Wheeler, confirms this analysis (79 Cong. Rec. 5654). He said:

> Section 208(a), page 26, as amended, permits the Commission to attach to all certificates, whether granted under the grandfather clause or otherwise, reasonable terms, conditions and limitations. In order to meet criticisms that the effect of these provisions would be to check the natural growth of operations if every increase in facilities required authorization by the Commission, the committee has amended section 208(a) by striking out lines 14 to 16, page 26, and by adding a proviso which permits operators to add to their equipment and facilities as business conditions may require, provided they do not go beyond the route or routes or outside the territory specified in their certificate. There was objection to the provision as it came in by a great many, so the committee amended it to meet the objection.

Since the Commission had no authority to limit the quantity of the service which a carrier may perform "over irregular routes" when it issued him his certificate, it has no such power now. *United States et al.* v. *Seatrain Lines, Inc.*, 67 S. Ct. 435, 438. The use of terminals, solicitors, schedules, and the other service features which make up the character of the service offered, all relate directly to the production of additional volume through the furnishing of additional facilities. The Commission has no power to limit the furnishing of any of them. The authority was requested of Congress but was expressly refused.

Neither the Commission nor the lower court in the instant case, nor Division 5 in the Brady case, gave heed to the legislative history hereinabove discussed, nor do the reports or decisions suggest any appreciation of the significance of that history in construing the governing statutory provisions.

In *U. S. et al.* v. *Seatrain Lines, Inc.*, 67 S. Ct. 435, was involved the power of the Commission to fix terms in a grandfather certificate granted to a common carrier by water. In issuing the certificate, the Commission limited it to operations only "as a common carrier by the 'Seatrain' type of vessel, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from freight cars between the ports of New York, N. Y., New Orleans, Louisiana, and Texas City, Texas." This court held that the limitation imposed was beyond the authority of the Commission. In so holding, this court drew a distinction between the Water Carrier Act and the Motor Carrier Act upon two grounds which might appear upon superficial examination to have a bearing upon the instant case:

(1) Section 208(a) of the Motor Carrier Act authorizes the Commission in issuing a certificate to motor carriers "to specify the service to be rendered"; Section 309(d) (49 U. S. C. A. 909(d)) of the Water Carrier Act grants no such authority upon the issuance of water carrier certificates.

(2) The proviso in Section 208(a) in the Motor Carrier Act withholds power from the Commission to restrict "the right of the carrier to add to his or its equipment and facilities *over the routes between the termini, or within the territory specified in the certificate,* as the development of the business and the demands of the public shall require." The proviso in Section 309(d) of the Water Carrier Act

uses in part the same phraseology but substitutes for the italicized words the following: "or service within the scope of such certificate."

By reason of these differences, this Court held that its decisions relating to the Commission's power in issuing a motor carrier certificate were not controlling. This does not, however, infer that this Court has directly or indirectly sustained the power of the Commission to specify the quantity or frequency of the service which may be rendered by a certificated motor carrier. The motor carrier cases cited in footnote 5 in the *Seatrain* case related entirely to other matters. In *Chicago, St. P. & M. N. O. R. Co.* v. *U. S.*, 322 U. S. 1, the requirement that a common carrier of property by motor vehicle serve intermediate points was sustained. In *Noble* v. *U. S.* 318 U. S. 88, a restriction in a permit issued a contract carrier by motor vehicle to service for persons who operate food canneries or meat packing business, was sustained. These restrictions are wholly foreign to the quantity or frequency of the service rendered. They illustrate what is not disputed: In granting certificates to motor carriers, the Commission does have power to distinguish between common and contract carriers in specifying the service to be rendered; and in specifying the service to be rendered by common carriers, to prescribe the routes, points or area, the geographic pattern of operation, the commodities to be carried and special provisions related to those commodities, such as the type of equipment to be used and the minimum weights for individual shipments. They do not suggest the existence of an unlimited power to limit the quantity and quality of the service of a common carrier of property within the scope of such specification. They do not suggest the existence of a power to modify such a carrier's obligation to carry for all to the limit of his facilities without discrimination.

The foregoing analysis of the legislative history of the Motor Carrier Act shows that the language of the original section was changed and the proviso added for the express

purpose of preventing Commission-imposed limitations *on the service* of motor carriers, without distinction as to regular or irregular route authorities. Certainly the right to add equipment and facilities is an empty right if the Commission may prevent their gainful employment. The changes in the Water Carrier Act may be considered as insurance features requested by the industry and designed to prevent just such action as the Commission is here attempting to take—the establishment of an administrative power through statutory interpretation which was requested by the Commission of the Congress and expressly denied it by Congress.

**B. The Commission's use of the words "over irregular routes" in the certificate issued to Draper was intended as a description of the geographic pattern of his operation and was not intended as a limitation on the quantity and quality of the service authorized. Any attempt to enlarge the meaning of those words so as to incorporate such a limitation is an attempt to revoke statutory rights contrary to the letter and the policy of the Act and to destroy property rights without due process of law.**

It is apparent that the Commision, in the *Falwell* and *Brady* cases, *supra,* is attempting to substitute its own beliefs for the expressed intention of the Congress. Congress recognized a need to limit the activities of any-where-for-hire property carriers by limiting them to the areas and commodities which they could prove they had served substantially and by classifying them either as common or contract carriers with the corresponding duties and limitations of whichever class applied. It specifically recognized that the needs of the public and the industry require that each carrier be left free to grow and enlarge its business within the scope of the territory and commodities authorized.

The Commission here attempts to serve the interests of regular-route common carriers at the expense of irregular-

route carriers by limiting their use of the facilities and methods of operation necessary for such growth. By so doing, the Commission is attempting what amounts to revocation of certificated rights without due process of law and in a manner contrary to the express mandate of the Congress. It is clearly futile for the Commission to say that its use of the words "over irregular routes" in certificates issued by it was intended to be a specification of the quality and the quantity of the service authorized in view of its lack of authority so to do. Even if it be assumed that the Commission had had such authority, the wide range of differentiation among irregular-route carriers in the service features and volumes of traffic shown in their "grandfather" evidence shows that the words "irregular routes" could not have been intended to define these characteristics or even indicate a general limitation on the quantity and quality of the service authorized, but rather were used to designate the geographic pattern of the operation.

If it be assumed, *arguendo,* that the Commission did have authority to specify and so limit the quantity and quality of the service to be performed, reference to its decisions shows that it did not use the phrase "over irregular routes" to so limit the service characteristics of carriers whose certificates contain this description. In the *Clemmetson Extension* case, 10 M.C.C. 739, the applicant held authority to transport specified commodities between fixed termini over irregular routes. He applied for regular route authority on the assumption that such authority was required because he always used the same highways in operating between the fixed termini. The Commission denied the application upon the ground that (page 740) "No further authorization is required with respect to these operations, • • •."

In the *J. Miller Co.* case, 42 M.C.C. 709, 712, the Commission said:

> In considering applications for authority to operate over regular routes, we have never required an appli-

cant to establish that it conducted a regular or scheduled service.

See also: *Dougherty Storage & Van Co.* case, 3 M.C.C. 427, 430; *Waltz Transptn., Inc.* case, 10 M.C.C. 30, 32.

In the *Gordons Transports, Inc.*, case, 29 M.C.C. 413, 414-415, the Commission said in substance that regular service and irregular service were not synonymous with regular routes and irregular routes, respectively, and that the term "regular routes" meant no more than operations conducted over certain designated highways. In the *Motor Cargo, Inc.*, case, 34 M.C.C. 519, 527-528, the Commission said in substance that a difference in the frequency of the operations as between the various parts thereof did not require the grant of regular-route authority for the frequent part and irregular-route authority for the less-frequent part.

In *Transport Corp. of Virginia Extension—Maryland*, 43 M.C.C. 716, 719, the Commission said:

> And, it has been held generally in motor-carrier proceedings under sections 5 and 212 (b) of the act that where common-carrier regular-route and irregular-route authorities, or two or more common-carrier irregular-route authorities, are unified for operation by one carrier, through service may be provided between authorized points in both of such authorities, unless the public interest requires the imposition of a restrictive condition against the rendition of through service in whole or in part. *The only requirement in these instances* has been that there must be a point of service common to both operating authorities and the physical operation must be rendered through such common point. (Emphasis supplied.)

In both the *Falwell* case, *supra*, and the *Brady* case, *supra*, the Commission found it necessary to examine the *evidence* upon which the irregular-route certificate had been granted in order to find what quantity and quality of service it now maintains that it authorized in the "grandfather" grant. It is apparent that the Commission, if permitted the exercise of this claimed authority, would limit the

quantity and quality of the service of irregular-route carriers to that which they were performing on June 1, 1935, denying them the right to growth and denying the public the greatest quantity and finest quality of service which these carriers would otherwise be able to provide. No other agency of transportation is so limited and so restricted; the Congress did not intend that this important and substantial part of the motor carrier industry should be so limited and restricted.

## CONCLUSION.

The foregoing discussion demonstrates that there is implicit in the decision by the Commission and by the lower court in this case a substantial question of law never before presented to this Court for determination.

On this issue, Brady and the Conference take the position that the Interstate Commerce Act provides the Commission with no authority to specify the quantity or quality of the service which may be performed pursuant to a certificate issued under section 206(a) (49 U. S. C. A. 306(a)) of the Act; that the Act provides no authority to differentiate between carriers operating over regular-routes and those operating over irregular-routes between the same points as to the quantity and quality of the service to be rendered; that the Commission, in issuing Draper's certificate authorizing operations "over irregular-routes" did not so specify the quantity or the quality of the service which he might render; and that by his certificate Draper is authorized to perform whatever quantity and quality of service his facilities and the needs of the public will permit. Therefore, the proposed use of those rights by Falwell would not be illegal.

If the conclusion by the Commission that the proposed transaction, subject to the provisions of section 5 (49 U. S. C. A. 5) of the Act, was not consistent with the public interest rests solely upon the finding of fact that consummation of the transaction would result in the exercise by

Falwell of the Draper authority in an unauthorized and therefore illegal manner, this conclusion is not supported by a finding of fact since that finding is founded on an error of law. If this Court finds that it must determine the validity of the Commission's order through consideration of the validity of the Commission's finding of prospective illegality of the operation, then the issue presented deserves consideration by this Court on its merits. On the other hand, if there can be found in the report other reasons or findings which support the Commission's conclusion, and the Court finds it unnecessary to decide the issue of illegality of the operation, discussed herein, so that that issue may be left for determination in a more appropriate proceeding, the Court is respectfully requested to expressly reserve consideration of that issue.

This brief in reply to the motion of appellees to affirm the decree of the lower court is presented in order to aid the Court in determining that a substantial and novel issue of law is involved. The nature of the issue has been explored more fully than might otherwise have been the case because, while this Court has in the *Maher* case, *supra,* and the *Seatrain* case, *supra,* been presented with issues somewhat similar to that discussed herein, any resemblance between them is superficial and disappears under close scrutiny. It has therefore been thought necessary to discuss these cases and the underlying authorities in some detail. It is to be hoped that this analysis will be helpful to the Court in passing on the motion to affirm.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that copy of this brief has been served upon each party indicated below by mailing a copy thereof, postage prepaid, to each.

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BEFORE THE

# Supreme Court of the United States

October Term 1946

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No. 1091

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C. W. FALWELL, JR., ET AL,
*Appellants,*

*v.*

UNITED STATES OF AMERICA, ET AL,
*Appellees.*

---

**BRIEF OF**
**REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.,**
**Amicus Curiae**

**and**

**BROOKS TRANSPORTATION COMPANY, INC.,**
**Intervenor**

**IN SUPPORT OF THE MOTION OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION TO AFFIRM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT OF VIRGINIA**

## CONSENT AND PETITION FOR LEAVE TO FILE BRIEF

It is hereby represented to the Court that all parties to the proceedings below have consented to the filing of this brief by intervenor Regular Common Carrier Conference.[1]

Intervenor shows that it is an autonomous conference of the American Trucking Association and has heretofore represented the common carrier industry, in national issues, before this Court.[2]

The Regular Route Conference (intervenor here) represents carriers engaged in service via fixed or regular routes and is thereby distinguished from carriers engaged in irregular route operations which latter group are separately represented by the Irregular Route Common Carrier Conference of the American Trucking Associations.

The Irregular Route Conference has made known its intention to file a brief herein as *amicus curiae* and therefore the Regular Common Carrier Conference deems it advisable to present to the Court its concept of the issues raised by appellants.[3]

Brooks Transportation Company was allowed to intervene below as a party in interest. Brooks Transportation Co. supports the motion of the United States and the Interstate Commerce Commission because it was a party to the proceedings below and has an economic interest in the matter.

## STATEMENT OF THE CASE

Insofar as the issues before the Interstate Commerce Commission and the court below were involved, appellant

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[1] Filed with the Clerk.

[2] *Interstate Commerce Commission v. Parker, et al*, 326 U. S. 60, 89 L. ed. 2051; *Nobel v. U. S.*, 319 U. S. 88, 87 L. ed. 1277.

[3] Consent given by appellees.

is a regular route interstate carrier handling commodities generally. Its operations extend from Lynchburg, Virginia to points in the east as far as New York.[4] Appellant sought to extend its operations westwardly into southwestern Virginia and on into West Virginia. In order to accomplish this appellant took two steps. It purchased a regular route interstate common carrier of general commodities, which carrier (Evans Line) operated from Roanoke, Virginia, westwardly through southwestern Virginia on into West Virginia.[5] This left the original Falwell Lines and the acquired Evans Lines separated by a distance of about forty miles between Lynchburg, Virginia and Roanoke, Virginia. To close this gap, Falwell undertook to acquire a portion of the interstate operating authority held by one Draper.

To bring into focus the issues raised by this latter maneuver on the part of Falwell it is necessary to clearly understand the nature of the rights which were held by Draper.

Draper held a certificate as an interstate common carrier of commodities generally, so, to that extent, the Draper rights were of the kind held by Falwell and Evans. But Draper is an *irregular* route carrier and in addition thereto Draper is a very limited or special type of irregular route carrier.[6]

The nature of the special or limited type of certificate held by Draper is made clear by pointing out that Draper is a *radial* irregular route carrier having authority to operate radially to and from a single base point, i. e., Roanoke, Virginia. Operating radially from Roanoke, Draper is authorized to serve numerous named points

[4] Falwell's rights were described by the Commission in its report and order.

[5] Evans' rights were described by the Commission in its report and order.

[6] Draper's rights were described by the Commission in its report and order.

such as Lynchburg, Virginia and Richmond, Virginia. In that setting Falwell undertook to acquire only that part of Draper's rights between Roanoke and Lynchburg but including Roanoke, the single and exclusive radial base. Nevertheless, Draper seeks to retain the right to operate from the single radial base of Roanoke and also to serve points beyond (east of) Lynchburg, such as Richmond, Virginia.

The sole interest and purpose of Falwell in securing a segment of the Draper rights is to bridge the gap (forty miles) in the Falwell-Evans regular route rights between Roanoke and Lynchburg. These interests and objectives being present Falwell applied to the Interstate Commerce Commission for authority to split off and acquire the segment of the Draper rights between Roanoke and Lynchburg.[7] Normally, action by the Commission on such applications require some time as other parties have a right to be heard in opposition and to avail themselves of such procedure as is provided by the Commission's Rules of Practice.[8] To facilitate immediate operations, Falwell availed itself of temporary authority procedure, which is ex parte in nature, and secured temporary authority to lease the segment of the Draper rights pending hearing and determination of an application for permanent authority to purchase the segment of the Draper rights.

Temporary authority was granted Falwell to lease the segment of the Draper rights (for 180 days) and Falwell also filed an application for permanent authority. At the hearing on the application for permanent authority, protestants appeared and resisted the application.[9] By the time the hearing was held on the application for permanent authority, Falwell had been operating the segment of the Draper rights for some months, therefore

[7] Stated by the Commission in its report and order.
[8] Application filed July 31, 1944, decided January 14, 1946.
[9] Stated by the Commission in its report and order.

the type of operation conducted and to be conducted by Falwell was fully established and shown of record and nothing was left for speculation.[10]

In determining whether Falwell should be authorized to acquire a segment of the Draper rights, the Commission had to resolve four primary issues:

1. Are the Draper radial irregular route rights of the kind that can be split or divided between two or more carriers? Would the division create two operating authorities where only one has been authorized?

2. If the Draper rights can be split and divided should Falwell be permitted to conduct a regular route operation (as a bridge) between Lynchburg and Roanoke, using an irregular route certificate as the operating authority?

3. Should Draper be permitted to disintegrate the certificate of public convenience and necessity held by him and thereby deprive the public of the radial service to which the public was entitled under the certificate?

4. Is the transaction consistent with the public interest under the National Transportation Policy, having in mind the competitive conditions which would be disturbed and affected by the extension of operations by Falwell into territory already served by numerous carriers.

The Commission denied Falwell's application to acquire the Draper rights [11] and Falwell appealed to the District Court which upheld the Commission [12] and now Falwell appeals to this Court.

The United States and the Interstate Commerce Commission having filed a motion to affirm the decision of the court below, these intervenors file this brief in support of said motion to affirm.

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[10] Stated by the Commission in its report and order.
[11] *Falwell—Purchase—Draper, Docket* MC-F-2600
[12] *U. S. D. C. of Virginia,* Decided Dec. 21, 1946.

## ISSUES INVOLVED

The issues in this case which are before this Court, are necessarily limited to issues of law because appellant has not brought up the record before the Commission and therefore the findings of the Commission cannot be challenged by appellant. Appellant seeks to raise issues of law and the case, in substance, comes down to the jurisdiction of the Commission to dispose of the application administratively as distinguished from statutory limitations which, as construed by appellant, would deprive the Commission of administrative discretion.

### APPELLANT'S POINT (a)

**"That the Report and Order of the Commission, Acting Through Division 4, of February 22, 1945, were, in Their Nature and Effect, a Certificate of Public Convenience and Necessity Within the Meaning of the Statutory Provisions."**

### APPELLANT'S POINT (b)

**"That the Report and Order of the Commission, Acting Through Division 4, of February 22, 1945, are not Subject to the Provisions of Section 17 of the Act (49 USCA 17), as the Report and Order of the Commission, Acting Through Division 4, of February 22, 1945, are Subject to the Provisions of Section 212 (a) of the Act (49 USCA 212(a)) and can be Suspended or Terminated only as Specifically Provided in the Aforenamed Section."**

## ARGUMENT

These points taken together involve three issues:

1. Is a report and order of a Division of the Commission the equivalent of a certificate? The issue has been answered in the negative by the courts.[13]

2. Can a Division of the Commission issue a report and order, under the circumstances of this case, which could have the force and effect of depriving protestants and the full Commission of the statutory right of reconsideration, review and appeal provided by the Interstate Commerce Act?[14] The issue has been answered in the negative by the courts and the Interstate Commerce Commission.[15]

3. Are the provisions of Section 212 (a) of the Interstate Commerce Act applicable under the facts and circumstances of this case?

The Commission has done nothing to modify or impair the certificate which is outstanding in the name of Draper and has not undertaken to do so. Draper is not alleging an injury from the Commission and is not before the Court.

This point has been fully covered by the motion to affirm, filed by the United States and the Interstate Commerce Commission and we therefore refrain from making a repetitious argument.

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[13] *Gregg v. U. S.*, 316 U. S. 74, 86 L. ed. 1283;
*U. S. v. Seatrain*, ——U. S. ——, 91 L. ed. 311.

[14] Section 17.

[15] *B. & O. Railroad v. U. S.*, 298 U. S. 349, 80 L. ed. 1209;
*Federal Radio Commission v. Nelson*, 289 U. S. 266. 77 L. ed. 1166;
*Baldwin v. Milling Co.*, 307 U. S. 478, 83 L. ed. 1409;
*Shawmut Trans. Co.*, 34 M. C. C. 569.

## APPELLANT'S POINT (c)

**"That There is no Statutory Authority for the Commission to Alter or Trim Down a Certificate of a Carrier by Imposing Limitations and Restrictions Upon the Kind of Service that the said Carrier can Render Differing from the Kind of Service that the Certificate Authorizes the Carrier to Render, as the Commission has Done with Respect to the Kind of Service Capable of Being Rendered Under the Certificate Issued to Draper."**

## ARGUMENT

This point involves three issues:

1. Does the Commission have statutory authority to classify carriers, make rules and regulations by classes, and has the Commission exercised such authority?

The Commission has authority to classify carriers [16] and has classified carriers and distinguished between the service of regular route and irregular route carriers.[17]

2. Has the statutory and administrative distinctions between types of common carriers been recognized by the courts?

These distinctions have been recognized and affirmed by the courts.[18]

3. Has the Commission modified or restricted rights heretofore granted under the Draper certificate?

The issue as stated by appellant presupposes facts which are not of record and presupposes results which do not follow in this case.

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[16] Interstate Commerce Act, Secs. 203(a)(14), 204b, 206(a) and 208.
[17] *Ex Parte MC* 10, 2 M. C. C. 703.
[18] *U. S. v. Maher*, 307 U. S. 148, 83 L. ed. 1162;
*Cresent Express v. U. S.*, 320 U. S. 401, 88 L. ed. 127;
*U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 86 L. ed. 971;
*I. C. C. v. Fordham Bus Corp.*, 38 Fed. Supp. 738;
*Garford Trucking Inc. v. U. S.*, 64 Fed. Supp. 780;
*I. C. C. v. G & M Motor T. Co.*, 64 Fed. Supp. 302.

The Commission has not modified any rights held by Draper under his certificate. The Commission has simply refused to permit Falwell to acquire a segment of the Draper rights and to perform a service thereunder which is beyond the scope of the Draper certificate. The practical effect is not a reduction by the Commission in the scope of the Draper certificate but a refusal by the Commission to allow Falwell to enlarge the scope of the Draper certificate and thereby annul the distinction between types of operations which the Commission is authorized to make and which distinctions have been recognized by the courts.

## APPELLANT'S POINT (d)

**"That the Report and Order of the Commission Dated January 14, 1946 are Contrary to the Provisions of Section 5 of the Act (49 USCA 5)."**

## ARGUMENT

This point involves three issues:

1. Does the Commission have administrative jurisdiction to determine whether a merger shall be effected?

Mergers and consolidations are lawful only upon approval by the Commission therefore appellant has no vested right to merge.[19]

2. What is the permissible scope of exercise by the Commission of its administrative discretion?

The measure of permissible administrative discretion may be any facts and circumstances found to be inconsistent with the public interest or contrary to the National Transportation Policy.

Here the Commission found the appellant had disregarded, proposed to disregard, and would necessarily disregard its classification of carriers.

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[19] Interstate Commerce Act, Sec. 5.
*McLean Trucking Co. v. United States*, 321 U. S. 67, 88 L. ed. 544.

Here the Commission found that the Draper rights cannot be split "if there is to be any possibility of preserving the irregular route nature of the service authorized" to Draper.

Had the record been brought before the court, many more cogent grounds for denial could be pointed to. Appellant's failure to produce the record cannot be turned into a weapon against the Commission. The Commission pointed out enough to support its order and appellant cannot imply that there was no more simply by withholding the record.[20]

3. To what extent are the statutory and procedural provisions applicable to appellant?

Appellant would torture the plain statutory requirements for findings by the Commission, under Section 5, disregard the Rules of Practice, and thereby accomplish by indirection that which is foreclosed by authorized procedure. Recognizing the weakness of its position, appellant applied to the Commission for a certificate for regular route operations between Roanoke and Lynchburg.[21] After full hearing the Commission found that appellant had failed to establish public convenience and necessity. Appellant knew that that ruling cannot be successfully assailed. This appeal if successful, would circumvent the administrative discretion of the Commission in the proceedings under both Section 5 and Section 207.

## CONCLUSION

In conclusion, we point out a recent case in which this Court referred to the discretion of the Commission:

> "Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to

[20] *Mississippi Valley Barge L. Co. v. U. S.*, 292 U. S. 282, 78 L. ed. 1267.

[21] Stated by the Commission in its report and order of January 14, 1946. Application denied by the Commission on May 2, 1946, Docket MC 903 Sub 17 (unreported).

> determine from its analysis of the total situation on which side of the controversy the public interest lies." *United States v. Detroit & Cleveland Navigation Co.*, 66 S. Ct. 75, 77.

The argument advanced by appellant would substitute its construction of the dead words of a statute for the administrative function of the Commission—the experts. This Court has so often recognized the duties and functions of the Commission that to us it seems unnecessary to belabor the issue with numerous cases. We will therefore close with just one more pertinent reference.

> "The function of 'weighing' in the evidence, therefore, remains peculiarly one for the Commission 'appointed by law and informed by experience', and not for the courts. *Alton Railroad Company v. United States*, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586; *Gray v. Powell*, 314 U. S. 402, 62 S. Ct. 326, 86 L. Ed. 301. This is in accord with the realization that the regulation of transportation involves various economic factors and the exercise of an empirical judgment, since 'The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.' *Board of Trade of Kansas City v. United States*, 1942, 314 U. S. 534, 546, 62 S. Ct. 366, 372, 86 L. Ed. 432." *Virginia Stage Lines v. United States*, 48 Fed. Supp. 79, 83.

We have been advised, informally, that the Irregular Route Common Carrier Conference expects to argue that there is presented here the broad general issues involving the distinctions between the service which regular route carriers and irregular route carriers may render under certificates issued under Section 208. Assuming that our advice is correct, it is our position that the Commission's power and discretion under Section 5 are entirely distinct from the question of permissible service under Section 208. Here the Commission had ample grounds to deny

Falwell's application under Section 5 and we submit that the Falwell case should be decided in the light of the Commission's discretion with respect to mergers under Section 5. Presumably the Irregular Route Common Carrier Conference may refer to a so-called Brady case, which is pending before the Commission and for that reason we wish to point out that the Brady case involves a charge of rendering service in excess of certificated authority, whereas the issues in the Falwell case involve consistency with the public interest under Section 5. We believe that there are no good reasons for confusing the issues in the Falwell case by reference to such issues as may at a later time arise under the Brady case.

The motion of the United States and the Interstate Commerce Commission to affirm the decision of the District Court should be granted.

Respectfully,

REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASS'NS., INC.
and
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March 19, 1947.

# APPENDIX

## INTERSTATE COMMERCE ACT

### NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

### POOLING; UNIFICATIONS, MERGERS, AND ACQUISITIONS OF CONTROL

Sec. 5. (1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of Section 1 of this part, it shall be unlawful for any common carrier subject to this part, Part II, or Part III to enter into any contract, agreement, or combination with any other such common carrier or

carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further*, That any contract, agreement, or combination to which any common carrier by water subject to Part III is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on the date this paragraph as amended takes effect, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate owner-

ship; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in Section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a

carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Com-

mission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

(3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this part, Sections 204(a) (1) and (2) and 220 of Part II, and Section 313 of Part III (which relate to reports, accounts, and so forth, of carriers), and Section 20a (2) to (11), inclusive, of this part, and Section 214 of Part II (which relate to issues of securities and assumptions of liability of carriers), including in each case

the penalities applicable in the case of violations of such provisions. In the application of such provisions of Section 20a of this part and of Section 214 of Part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means, it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this part; and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this part shall apply to such a violation by any other person.

(8) The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

(10) Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a transaction within the scope of paragraph (2) where the only parties to the transaction are motor carriers subject to Part II (but not including a motor carrier controlled by or affiliated with a carrier as defined in Section 1 (3)), and where the aggregate number of motor vehicles owned, leased, controlled, or operated by such parties, for purposes of transportation subject to Part II, does not exceed twenty.

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power) with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise

any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

(12) If any provision of the foregoing paragraphs of this section, or the application thereof to any person or circumstances, is held invalid, the other provisions of such paragraphs, and the application of such provision to any other person or circumstances, shall not be affected thereby.

(13) As used in paragraphs (2) to (12), inclusive, the term "carrier" means a carrier by railroad and an express company, subject to this part; a motor carrier subject to Part II; and a water carrier subject to Part III.

## COMMISSION PROCEDURE; DELEGATION OF DUTIES; REHEARINGS

Sec. 17 (1) The Commission is hereby authorized by its order to divide the members thereof into as many divisions (each to consist of not less than three members) as

it may deem necessary, which may be changed from time to time. Such divisions shall be designated, respectively, division one, division two, and so forth, or by a term descriptive of the principal subject, work, business, or function assigned or referred to such divisions. The Commission may designate one or more of its divisions as appellate divisions. Any Commissioner may be assigned to such division or divisions as the Commission may direct, and the senior in service of the Commissioners constituting a division shall act as chairman thereof unless otherwise directed by the Commission. When a vacancy occurs in any division or when a Commissioner because of absence, or other cause, is unable to serve thereon, the Chairman of the Commission or any Commissioner designated by him for that purpose may serve temporarily on such division until the Commission otherwise orders.

(2) The Commission may by order direct that any of its work, business, or functions under any provision of law (except matters required to be referred to joint boards by Section 205, and except functions vested in the Commission under this section), or any matter which shall have been or may be referred to it by Congress or by either branch thereof, be assigned or referred to any division, to an individual Commissioner, or to a board to be composed of three or more eligible employees of the Commission (hereinafter in this section called a "board") to be designated by such order, for action thereon, and the Commission may by order at any time amend, modify, supplement, or rescind any such assignment or reference. The following classes of employees shall be eligible for designation by the Commission to serve on such boards: examiners, directors or assistant directors of bureaus, chiefs of sections, and attorneys. The assignment or reference, to divisions, of work, business, or functions relating to the lawlessness of rate, fares, or charges shall be made according to the character of regulation to be exer-

cised and not according to the kind or class of the carriers involved or to the form or mode of transportation in which such carriers may be engaged. When an individual Commissioner, or any employee, is unable to act upon any matter so assigned or referred because of absence or other cause, the Chairman of the Commission may designate another Commissioner or employee, as the case may be, to serve temporarily until the Commission otherwise orders.

(3) The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Secretary of the Commission, or any member of a board may administer oaths and affirmations and any member of the Commission or the Secretary of the Commission (or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves) may sign subpoenas. A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commissioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested. All hearings before the Commission, a division, individual

Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest.

(4) A division, an individual Commissioner, or a board shall have authority to hear and determine, order, certify, report, or otherwise act as to any work, business, or functions assigned or referred thereto under the provisions of this section, and with respect thereto shall have all the jurisdiction and powers conferred by law upon the Commission, and be subject to the same duties and obligations. The secretary and seal of the Commission shall be the secretary and seal of each division, individual Commissioner, or board. Except as otherwise provided in this section, any order, decision, or requirement of a division, an individual Commissioner, or a board, with respect to any matter so assigned or referred, shall have the same force and effect, and may be made and evidenced in the same manner as if made or taken by the Commission.

(5) Any finding, report, or requirement of an individual Commissioner or board, with respect to any matter so assigned or referred involving the taking of testimony at a public hearing, shall be accompanied by a statement in writing of the reasons therefor, together with a recommended order, which shall be filed with the Commission. Copies thereof shall be served upon interested parties (including, in proceedings under Part II, persons specified in Section 205 (e)), who may file exceptions thereto, but if within 20 days after service upon such persons, or within such further period as the Commission or a duly designated division thereof may authorize, no exceptions shall have been filed, such recommended order shall become the order of the Commission and become effective unless within such period the order shall have been stayed or postponed by the Commission or by a duly designated

division thereof. The Commission, or a duly designated division thereof, upon its own motion may, and where exceptions are filed it shall, reconsider the matter either upon the same record or after further hearing, and such recommended order shall thereupon be stayed or postponed pending final determination thereof.

(6) After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5), any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of a matter assigned or referred to an individual

Commissioner or a board, under the provisions of paragraph (2), if such application shall have been filed within 20 days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5), and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

(7) If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order.

(8) Where application for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision, order, or requirement has not yet become effective, the decision, order, or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission.

(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of

a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

(10) Any matter arising in the administration of Part II of this Act as to which a hearing is to be held may be referred to an examiner of the Commission, for action thereon, subject to the conditions and limitations provided in this section in the case of reference of work, business or functions as to which a hearing is to be held, to an individual Commissioner or board.

(11) Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this Act affecting such employees.

(12) The Commission is authorized to promulgate reasonable rules and regulations relating to admission to practice before it, and is authorized to impose a reasonable fee for such admission, and such fees shall be covered into the Treasury of the United States as miscellaneous receipts.

## DEFINITIONS

SEC. 203. (a) As used in this part—

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or prop-

erty or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to Part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to Part I.

## GENERAL DUTIES AND POWERS OF THE COMMISSION

SEC. 204. (b) The Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term "common carrier by motor vehicle," or "contract carrier by motor vehicle," as the special nature of the services performed by such carriers or brokers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this part, to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest.

## APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. (a) Except as otherwise provided in this section and in Section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operation: *Provided, however,* That, subject to Section 210, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes

or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, and has so operated since that time except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in Section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in

such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provision of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

## ISSUANCE OF CERTIFICATE

SEC. 207. (a) Subject to Section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

## TERMS AND CONDITIONS OF CERTIFICATE

SEC. 208. (a) Any certificate issued under Section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under Section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

(b) A common carrier by motor vehicle operating under any such certificate may occasionally deviate from the route over which, and/or the fixed termini between which, it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed.

(d) A certificate for the transportation of passengers may include authority to transport in the same vehicle with the passengers, newspapers, baggage of passengers, express, or mail, and to transport baggage of passengers in a separate vehicle.

## SUSPENSION, CHANGE, REVOCATION, AND TRANSFER OF CERTIFICATES, PERMITS, AND LICENSES

SEC. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in Section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the

provisions of Section 206, 209, or 211, or by virtue of the second proviso of Section 206 (a) or temporary authority under Section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of Section 211 (c), 217 (a), or 218 (a), or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

No. 1091. FALWELL ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for

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the Western District of Virginia. March 31, 1947. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. §§ 5 and 17, Interstate Commerce Act, 54 Stat. 905, 913, 49 U. S. C. §§ 5 and 17. *W. G. Burnette* for appellants. *Acting Solicitor General Washington* and *Daniel W. Knowlton* for the United States et al., appellees. *J. Ninian Beall* and *H. Lauren Lewis* filed a brief for the Regular Common Carrier Conference of American Trucking Assns. et al., as *amici curiae*, urging granting of the motion to affirm. *Nuel D. Belnap, E. B. Ussery* and *Rex H. Fowler* filed a brief for the Brady Transfer & Storage Co. et al., as *amici curiae*, replying to the motion to affirm. Reported below: 69 F. Supp. 71.